

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Ramlal Negi (JM)

I.T.A. No. 6921/Mum/2014
(Assessment Year 2009-10)

Lokesh Ramgopal Agrawal 1405, Rustomjee Adarsh Excellancy, Adharsh Dughdalaya Lane, Malad(W) Mumbai-400 064.	Vs.	DCIT Range 24(2) C-13, Pratyakshakar Bhavan, BKC Bandra East Mumbai-400 050.
(Appellant)		(Respondent)

PAN No. AABPA2830M

Assessee by	Shri Nitesh Josh & Shri Sunil Jhunjhunwala
Department by	Shri Rajesh Kumar Yadav
Date of Hearing	11.5.2017
Date of Pronouncement	31.5.2017

ORDER

Per B.R. Baskaran (AM) :-

The appeal of the assessee is directed against the order dated 21-08-2014 passed by Ld CIT(A)-34 for assessment year 2009-10. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the assessment of deemed income u/s 2(22)(e) of the Act.

2. We heard the parties and perused the record. The assessee received a loan of Rs.25.00 lakhs from a closely held company named M/s Gangotri Merchants P Ltd. The outstanding balance as on 31.3.2009 along with interest stood at Rs.26,05,479/-. The assessee is holding more than 10% of the Shares in the above said company and hence the Assessing officer proposed to assess the above said balance of Rs.26,05,479/- as deemed dividend in the hands of the assessee in terms of sec. 2(22)(e) of the Act.

3. The assessee submitted that the lending is part of normal business activities of M/s Gangotri merchants P Ltd and hence the money borrowed by the assessee would fall within the exceptions provided u/s 2(22)(e) of the Act. The assessee also submitted that M/s Gangotri Merchants P Ltd does not have accumulated profits. The "Reserves & Surplus" was showing balance in "Share Premium account" and "Statutory Reserves account". The assessee submitted that both these accounts could not be used to pay dividend and hence they cannot be called as accumulated profits. In the absence of accumulated profits, it was contended that there is no scope for assessing any income u/s 2(22)(e) of the Act. The assessee placed reliance on certain case laws to support his contentions. The AO noticed that M/s Gangotri Merchants P Ltd has been classified as an "Investment Company" by RBI and hence he concluded that the M/s Gangotri Merchants P Ltd cannot be considered as engaged in money lending business. Since the definition of the term "accumulated profits" uses the expression "whether capitalised or not", the AO did not accept the contentions of the assessee that the Share premium account and Statutory reserve shall not form part of accumulated profits. The AO accordingly assessed the above said amount as deemed dividend in the hands of the assessee.

4. The Ld CIT(A) also confirmed the order passed by the AO and hence the assessee has filed this appeal.

5. We notice that the nature of business activities of the assessee has been described as "Investment & financing advancing" in the tax audit report. The assessee has been registered as a "Non banking financing company" by RBI. As at the year end, we notice that the assessee had made investments to the tune of Rs.3.65 crores and given loans of Rs.2.67 crores. It has also held shares as its trading assets. We notice that the loans given by the assessee account for more than 25% of the available funds and also the assets deployed. Further we

notice that the share trading activities has resulted in loss during the year under consideration. In view of the above, the Ld A.R submitted that the financing activity constitutes substantial part of its business activities and in this regard, he placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Cit Vs. Parle Plastics Ltd and another (332 ITR 63). In the above said case, the assessee before Hon'ble Bombay High court had incurred loss from other activities and made profit from financing activities. 39% of its total assets as at the yearend and 42% of its total assets as at the beginning of the year consisted of loans advanced by it. Under these set of facts, the Tribunal had held that the lending of money constituted substantial part of the activities of the assessee and the same was confirmed by Hon'ble Bombay High Court.

6. In the instant case, the assessee has demonstrated that the share trading activity has resulted in loss of Rs.11.39 lakhs, whereas its interest income was Rs.12.20 lakhs. Hence the income from money lending activity constitutes about 50% of its gross income. We notice that the Hon'ble Bombay High court has held that the question as to what constitutes "Substantial part of income" has to be decided on the facts and circumstances of each case. In the facts available in the instant case, which has been discussed above, we are of the view that the lending of money constitutes substantial part of business of the above said company. In this view of the matter, we are of the view that the assessee would be covered by exception provided u/s 2(22)(e) of the Act.

7. The next contention of the assessee is that it does not possess accumulated profits. The reserves and surplus balance consisted of Share premium account and Special reserves account only. Since the assessee could not declare dividend from these accounts, it was contended that these accounts cannot form part of "accumulated profits". Though the tax authorities have

rejected this contention of the assessee, we notice that the same finds support from the following case law atleast in respect of Share Premium account:-

- (a) DCIT Vs. MAIPO India Ltd (2008)(24 SOT 42)(Delhi)
- (b) DCIT Vs. Radhe Sham Jain (2012)(2013)(140 ITD 244)(Chand)

Hence we are of the view that there is merit in this contention in respect of Share premium balance.

8. In view of the foregoing discussions, we are of the view that the impugned loan taken by the assessee cannot be assessed as deemed dividend in terms of the provisions of sec. 2(22)(e) of the Act. Accordingly we set aside the order passed by Ld CIT(A) on this issue and accordingly direct the AO to delete the assessment of deemed dividend made in the hands of the assessee in this year.

9. In the result, the appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 31.5.2017.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/5/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai