

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BENGALURU**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

<i>ITA No. & Asst.year</i>	<i>Appellant</i>	<i>Respondent</i>
497/Bang/2014 2010-11	M/s.Duster Total Solutions Services Pvt. Ltd. No.50, 4 th floor, Zatakia Centre, 100 feet Road, Indiranagar, Bengaluru-560038 PAN: AACCD 5989 Q	Asst. Commissioner of Income-tax(TDS), TDS Circle 16(1), Bengaluru
1067/Bang/2014 2010-11	Dy. Commissioner of Income Tax (TDS), Circle 16(1), Bengaluru	M/s.Dusters Total Solutions (P) Ltd., Bengaluru

Assessee by : Shri R.Vijayaraghavan, CA.
Revenue by : Shri Sunil Kumar Agarwal, Addl.CIT(DR)

Date of hearing : 21/09/2017
Date of pronouncement : 19/12/2017

O R D E R

Per INTURI RAMA RAO, AM :

These are cross appeals filed by both the assessee-company as well as the revenue directed against the order of the Commissioner of Income-tax (Appeals), Mysore, [CIT(A)] dated 19/12/2013 for the assessment year 2010-11.

2. Since issues involved in both the appeals are common, we proceed to dispose of the same by way of this consolidated order. At the outset, there is a delay in filing of appeal by 45 days in ITA No.1067/Bang/2014. The revenue filed petition for condonation of

delay. For the reasons stated in the condonation petition, delay in filing of appeal is condoned.

3. Briefly facts of the case are that the assessee is a company engaged in the business of providing cleaning services for corporate sectors. Survey operations u/s 133A of the Income Tax Act 1961 [‘the Act’ for short] were conducted in the business premises of the assessee on 21/06/2012. During the course of such survey proceedings the ACIT, TDS Circle-15(1) [hereinafter referred to as ‘the TDS officer’ found that during the financial years 2009-10 and 2010-11, sums of Rs.59,09,621/- and Rs.4,29,79,871/- respectively have been advanced as loans to directors of companies, who have substantial interest in the assessee-company. The details of said loan are as under:

FY	Beneficiary	Amount given as Loan/ advance	
2009-10	Jasmer Kewal Puri	25,962,921	
	Shamsher Puri A/c	9,365,970	
	The Dusters	16,053,169	
	Total Solutions Facility Magt Pvt Ltd.	7,627,561	
	Sub Total for FY 2009-10		59,009,621
2010-11	Advance to Directors	34,364,532	
	Total Solutions Facility Magt Services Pvt. Ltd.	8,615,339	
	Sub Total for FY 2010-11		42,979,871
	TOTAL		101,989,492

Therefore, the TDS officer has come to the conclusion that the above payments are in the nature of deemed dividend liable to tax deduction at source u/s 194 of the Act. The facts set out by the TDS officer are extracted below:

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The concern "The Dusters" was included in the order because it is a proprietary concern of Shri. Shamsheer Puri, the Managing Director of the assessee company in which he has substantial interest. The other recipient, Total Solutions Facility Management Pvt Ltd. (TSFM) is a concern in which the other director Shri. Jasmer Puri has substantial interest (In fact, Shri. Jasmer Puri owns more than 90% of the shares in TSFM). Also, in the assessee company Balance sheet as at 31.03.2011, TSFM is mentioned as a company under the same management.

Under the circumstances, the payments made to the Directors of the Company, namely to Shri. Shamsheer Puri and Shri. Jasmer Puri and payments to the concerns "The Dusters" and Total Solutions Facility Management Pvt Ltd. (TSFM) totaling to the extent of Rs. 5,90,09,621/- as appearing in the Balance Sheet as on 31.03.2010 which has been classified under Loans/ Advances in the Balance Sheet are taken as Advance/Loan. As such, the advances so made to the Directors amount to dividend u/s 2(22)(e) and would attract the provisions of Section 194 of the IT Act. The dividend amount could be worked out at Rs. 5,78,39,133/- i.e. to the extent of the **Accumulated Profits**. The calculation is given below:

FY 2009-10	
Accumulated profits	
1) Profit and Loss Account	4,07,45,628
2) Capital reserve	1,70,93,505
Total	5,78,39,133

However, under the given facts and circumstances the deduction of TDS as per the provisions contained in Section 194 have been failed to be adhered to and the payments have been defaulted. Accordingly, the assessee company is held to be an Assessee-in-Default u/s 201(1) to the extent of such tax. i.e. **Rs. 57,83,913/-** (at 10% of the the dividend u/s 194 of the IT Act)

Accordingly, the TDS officer treated the assessee as assessee in default u/s 201(1) of the Act to the extent of tax of Rs. 57,83,913/- and also levied interest u/s 201(1A) of Rs. 16,19,495/-.

5. Being aggrieved, an appeal was filed before the CIT(A) contending *inter alia* that the shareholding of Shri Jasmer Puri and Shri Shamsheer Puri in the assessee's company does not exceed more than 4% which is below 10% voting power of the company and further contended that loans/advances are made during the course of business transactions consequent to the scheme of amalgamation of the company M/s. Facility

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Management Business of TSFM. It was further contended that while calculating accumulated profits of the assessee company, capital reserves of Rs.1.7 crore should not be reckoned as part of the accumulated profits.

The CIT(A), after duly considering the submission of the assessee-company held that loans/advances to Shri Jasmer Puri and his concern M/s.Total Service Facility Management Private Limited does not constitute 'deemed dividend' as the shareholding of Shri Jasmer Puri is less than 1% of the total shareholding of the assessee-company. However, he remanded the matter back to the Assessing Officer [AO] for the purpose of verifying percentage of shareholding by the Shri Jasmer Puri in the assessee-company. As regards advances made to Shri Shamsher Puri and 'The Dusters', the CIT(A) confirmed the action of the TDS Officer.

6. Being aggrieved with that part of the order which is against the assessee, the assessee-company is in appeal in ITA No.497/Bang/2014 and being aggrieved by that part of the order which is in favour of the assessee, the revenue is in appeal in ITA No.1067/Bang/2014.

7. The assessee-company raised the following grounds of appeal in ITA No.497/Bang/2015:

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1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the facts of the case and is also opposed to law.
2. The Learned CIT (A) erred in considering the capital reserve as a part of accumulated profits for the purpose of determining the quantum of deemed dividend under section 2(22)(e) of the Income Tax Act 1961
3. The Learned CIT (A) ought to have appreciated that the dividend is taxable only to the extent of "Accumulated Profits" which does not include capital reserve and therefore loan not covered by accumulated profits is not deemed to be dividend.
4. The Learned CIT (A) erred in treating the amount outstanding as a result of normal business transaction with Mr. Shamsher Puri (the Managing Director) and The Dusters as a dividend under section 2(22)(e) of the Income Tax Act 1961. The Learned CIT (A) ought to have appreciated that amount remaining as a debit or credit balance out of normal business transactions are not intended to be covered under section 2(22)(e) of the Income Tax Act as held in the case of Commissioner of Income Tax Vs Raj Kumar by the Hon'ble Delhi High Court – 23 DTR 304 and various other judicial pronouncements.
5. Without prejudice to the above, we submit that the Learned CIT (A) ought to have appreciated that payment made to wife of Mr. Shamsher Puri (relative of a Director) does not fall under the ambit of sec 2(22)(e) of the Income Tax Act 1961 and therefore cannot be treated as a deemed dividend.
6. For these and other reasons to be adduced at the time of hearing, the appellant prays for favorable order on the appeal. The appellant further craves leave of the Hon'ble ITAT for adding to or amending the aforesaid grounds of appeal.

7.1 The learned counsel for the assessee submitted that the company called 'Total Sales Facility Management Private Limited' was merged with the assessee-company under the scheme of merger as approved by the Hon'ble Court of Bombay on 26/07/2010 and Hon'ble High Court of Karnataka on 8/7/2010. As per this scheme, an appointed date was fixed as 01/04/2009 and the effective date of merger was 21/07/2010. Consequent to merger of said company, Shri Jasmer Puri who is also shareholder in Total Sales Facility Management Private Limited was allotted additional shares on 21/07/2010. Only after allocation of these shares, Shri Jasmer Puri share-holding has increased beyond 10% of the share capital of the company. But as on the date of loan/advances share- holding of Shri Jasmer Puri was less than 1% and therefore the provisions of section 2(22)(e) of the Act are not applicable. He further

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contended that while computing accumulated profits of the assessee company, for the purpose of treating advances as 'deemed dividend', capital reserves should not be considered as part of the accumulated profit. Reliance in this regard was placed on the decision of the coordinate bench of the Tribunal reported in *ACIT vs. TVS Motors Co. Ltd.* (128 ITD 47). He also relied on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. C.R.Dass* (204 Taxman 227) in support of the proposition that share-holding on the date of grant of advance should alone be considered. He finally submitted that advances are made only for the purpose of business. He fairly conceded that he is not in a position to lead evidence in support of this contention. As regards shareholding of JP, there is no dispute with regard to the percentage of shareholding held by him that it is more than 10%.

7.2 On the other hand, the learned CIT(DR) placed reliance on the orders of the lower authorities.

8. We heard rival submissions and perused material on record. The issue in the present appeal is whether the TDS Officer was justified in treating advance made to S/Shri Jasmer Puri and Shamsher Puri in the assessee-company as deemed dividend u/s 2(22)(e) of the Act and consequently whether the assessee-company was liable for deduction of tax at source u/s 194 of the Act. It is *sine qua non* for invoking provisions of 2(22)(e) that the concerned shareholder should be holding shares in excess of 10%. With regard to the case of Shri Shamsher Puri, there is no dispute that he was holding more than 10% of the shares. But as regards Shri Jasmer Puri, percentage of shares held by him is in dispute as it is contended that as on the date of grant of

advances the shareholding of Shri Jasmer Puri is only 1%. It is the contention of the assessee-company that on the date of granting advance the shareholding of Shri Jasmer Puri is only 1%. On perusal of the orders of the lower authorities, it is not clear whether the TDS officer had examined this issue with reference to statutory records maintained under the Companies Act. Therefore, this issue requires remand to the TDS Officer. Accordingly we remand the matter back to the file of the TDS officer for the purpose of verifying the number of shares held by Shri Jasmer Puri as on the date of grant of advance. While computing accumulated profits, for the purpose of amount of deemed dividend u/s 2(22)(e) of the Act, capital reserves cannot be taken into consideration in the light of decision of the co-ordinate bench of Tribunal in the case of *ACIT vs. TVS Motors Ltd.* (128 ITD 47). Therefore, this issue also we remit back to the file of the TDS officer. It is ordered accordingly.

10. The revenue raised the following grounds of appeal in ITA No.1067/Bang/2014:

1. *"The Ld.CIT(A) failed to appreciate that the shareholding of Jasmir Puri is not less than 10% considering that he has voting rights equal to 26% of total voting rights and that makes the assessee liable for charge of deemed dividend tax u/s 2(22)(e) of the IT Act. Accordingly the TDS provisions are also attracted.*
2. *The Ld.CIT(A) has erred in not appreciating the fact that the provisions of deemed dividend u/s 2(22)(e) had to be concluded after verifying the share holding ratio of the Directors.*
3. *The Ld.CIT(A) has erred in concluding that the shareholding of Jasmir Puri is less than 10% and consequently misdirected himself in allowing the relief to the assessee.*
4. *The CIT(A) has erred in not calling for details and verifying the same from the record of the Company during the appellate proceedings.*

For these and other grounds that may be raised during the course of appeal and actual hearing, the appellant prays that the order of

learned Commissioner of Income Tax (Appeals) may be set aside and cancelled."

11. The revenue is contesting the finding of the CIT(A) that the share- holding held by Shri Jasmer Puri is less than 0.1%. From the perusal of the order of the CIT(A), it is clear that the CIT(A) has remanded the issue back to the file of the TDS Officer for the purpose of verifying this fact. In the assessee's appeal in ITA No.497/Bang/2014, we remanded this issue for verification of percentage of shareholding held by JP as on the date of grant of advance. We do not find any grievance of the revenue in this finding of the CIT(A).

12. In result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 19th December, 2017.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

srinivasulu, sps

Sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore