

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.633/M/2013
Assessment Year: 2009-10**

M/s. AL-AZI Polymers, 1 Net Industrial Estate, Andheri Kurla Road, Andheri East, Mumbai – 400 072 PAN: AAGFA4589A	Vs.	The Asst. Commissioner of Income Tax, Ward 21(3), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Bharat Gandhi, A.R.
Revenue by : Shri Rajesh Kumar Yadav, D.R.

Date of Hearing : 08.01.2018
Date of Pronouncement : 09.02.2018

ORDER

Per D.T. GARASIA, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 30.01.2012 the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The first ground relates to addition under section 2(22)(e) of the Act. The short facts of the case are that during the course of assessment proceedings the Assessing Officer (hereinafter referred to as the AO) noticed that two partners of the assessee firm were

holding 53.76% & 24.61% of shares respectively. During the course of hearing it was explained before the AO that assessee had purchased machinery from M/s. Deep Enterprises for a sum of Rs.14,56,000/- out of which a sum of Rs.5,06,000/- was paid from the books of assessee group company. Thereafter, assessee has shown that it is paid from assessee's group company. Therefore, AO was of a view that assessee firm is not registered shareholder with company, but the payment is made by the company, therefore, section 2(20)(e) is applicable to the facts of the case.

3. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the appeal of the assessee.

4. The Ld. A.R. submitted that the assessee has made transactions with the firm which are not registered share holder of the assessee company but it is a normal business transactions which are out of purview of deemed dividend under section 2(22)(e) of the Act. He relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Ambassador Travels (P) Ltd. 318 ITR 376. The Ld. A.R. also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs. Jignesh P. Shah.

5. On the other hand, the Ld. D.R. relied upon the order of Revenue Authorities.

6. We have heard the rival contentions of both the parties. We find that the Hon'ble Delhi High Court in the case of CIT vs. Ambassador Travels (P) Ltd. (supra) held as under:

“The assessee was a travel agency and the two concerns that it had dealings with, that is, HRPL and ATPL were also in the tourism business. The assessee was involved in the booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day-to-day business activities. The financial transactions cannot in any circumstances be treated as loans or advances received by the assessee from these two concerns. The Tribunal was right in coming to the conclusion that the provisions of s.2(22)(e) are not applicable. No substantial question of law arises.

Conclusion:

Assessee, a travel agency, booking resorts for the customers of the companies, they were normal business transactions and could not be treated as deemed dividend under s. (22)(e) because of shareholding pattern.”

7. We also find that similar issue had come up before Hon'ble Supreme Court in the case of CIT vs. Matru Housing wherein Hon'ble Supreme Court has held as under:

“U/s 2(22)(e), any payment by a closely-held company by way of advance or loan to a concern in which a substantial shareholder is a member holding a substantial interest is deemed to be “dividend” on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance. The legal fiction in s. 2(22)(e) enlarges the definition of dividend but does not extend to, or broaden the concept of, a 'shareholder". As the assessee was not a shareholder of the paying company, the "dividend" was not assessable in its hands.”

8. Respectfully following the above decision of Hon'ble Delhi High Court and Hon'ble Supreme Court we are of the view that it is a normal business transaction which is outside the purview of deemed dividend under section 2(22)(e) of the Act. We also hold that only a person who is a registered share holder, the section 2(22)(e) can be invoked. The definition of shareholder cannot be enlarged by way of fixation to include other persons. We find that in

this case the assessee has made purchase and assessee is not a registered share holder and dividend can be assessed only in the hands of registered share holder but not in the hands of non shareholders. Therefore, respectfully following the same, we allow this ground of appeal.

9. The second ground is with regard to confirmation of interest income of Rs.2,08,396/- credited to profit and loss account to tax under the head "Income from other sources" and excluded while computing the deduction under section 80IB.

10. The short facts of the case are that the AO while granting deduction u/s. 80IB excluded a sum of Rs.2,08,396/- which was interest on FDRs with bank on the grounds that the interest income was assessable under the head 'Income from Other Sources' and it was not derived by eligible activity of industrial undertaking.

11. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the same.

12. We have heard the rival contentions of both the parties. The contention of the Ld. AR cannot be accepted. The pleas of the assessee that the interest of FDRs has nexus to the activity of the undertaking cannot be accepted because in order to earned income of undertaking to be eligible for deduction u/s.80IB there should be a direct and first level nexus between the income earned and the activity of the undertaking. In view of the decision laid down by the

Apex Court in the case of Liberty India 317 ITR 218 (SC) the intersection FDRs and margin money earned by the assessee cannot be taken as derived by the undertaking and hence the same is not eligible for deduction u/s.80IB. In case of Shah Originals 232 CTR ITR 228(Bom) in the context of section 80HHC also, it has been held that the term 'derived' is of narrower connotation than the term attributable to and postulates the existence of a direct and proximate nexus with the export activity. Accordingly the gain due to exchange fluctuation on EEFC a/c having export proceeds was held not to be eligible for deduction u/s 80HHC on grounds that the nexus with exports is only upto the point of receipt of the export proceeds and thereafter any gain due to exchange fluctuation on export proceeds lying EEFC a/c has no proximate and direct nexus with export. The Incomes which have no nexus to export are independent incomes and not the operational income and hence they are not to be reduced under explanation (baa) of 80HHC as held in case of K Ravindranathan Nair 295 ITR 228(SC) and Dresser Rand India Ltd 232 CTR 52 (Bom). This view is also supported by the decision in case of Sword Global 122 ITD 103(Chennai), Global Vantedge P. Ltd. 1 ITR (trib) 326(Del), etc. The activity of making FDR was not the business activity of the undertaking and hence even if such deposit is required for the purpose eligible business so far as the request of the appellant for netting of the interest is concerned the same cannot be allowed, once the interest earned on the FDRs was not for the purpose of eligible business of the undertaking. The interest earned on FDRs is assessable under the head income from

other sources whereas the interest paid on loans used for business is allowable as business expense/ deduction u/s 36(1)(iii) and hence the business expense cannot be set off against the income from other sources and hence the request of the Ld. AR for netting of interest also cannot be accepted. Therefore the alternate plea of the appellant in netting of income earned the interest paid by the assessee also cannot be accepted because the interest earned is assessable under the income from other sources and has no direct nexus with the activity of the undertaking. Hon'ble Bombay High Court in the case of Asian Star Co. 326 ITR 56 (Bom) has held that interest earned on the FDRs cannot be treated against the interest incurred by the assessee for the purpose of claiming deduction u/s.80HHC. Since provisions of sec.80IB are pari-materia to the provisions of 80HHC, therefore netting of the interest cannot be allowed for purpose of computing deduction 80IB also. This view is also supported from the decision in the case of Liberty Footwears 287 ITR 339 (P & H). In view of the above, this ground of the appeal is dismissed.

13. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 09.02.2018.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 09.02.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.