

आयकर अपीलिय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA No.330/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Mr. Mukund Dhariya,
M/s. Aryan Construction,
Plot No.43, Indu Niwas,
Shivaji Housing Society,
Shivajinagar, Pune – 411 015
PAN : AAPPD8665F

.... अपीलार्थी/Appellant

Vs.

DCIT, Circle-3, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.754/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

DCIT, Circle-3, Pune

.... अपीलार्थी/Appellant

Vs.

Mr. Mukund Jaishankar Dhariya,
M/s. Aryan Construction,
Plot No.43, Indu Niwas,
Shivaji Housing Society,
Shivajinagar, Pune – 411 015
PAN : AAPPD8665F

.... प्रत्यर्थी / Respondent

Assessee by : Shri C.V. Chitale
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / Date of Hearing : 09.04.2018	घोषणा की तारीख / Date of Pronouncement: 11 .04.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

These are the cross appeals filed against the order of CIT(A)-3,
Pune, dated 30-01-2015 for the Assessment year 2010-11.

2. Briefly stated relevant facts of the case are that assessee is an
individual and is a Civil Contractor. Assessee filed the return of income

on 30-08-2010 declaring total income of Rs.69,00,670/-. Assessee is a Director of Dhariya Infrastructure Development Pvt. Ltd. (in short 'DIDPL'). Earlier, this company was known as Aryan Udyog Pvt. Ltd. These companies are engaged in the business of Government Contracts for construction of Dams and Canals and Rehabilitation of Villages. During the assessment proceedings, AO noticed various discrepancies in the accounts of the assessee. AO computed the assessed income at Rs.1,83,70,700/- after making following additions :

<i>Addition as discussed in Para No.5 of the Assessment Order</i>	<i>Rs.84,50,000</i>
<i>Addition as discussed in Para No.6 of the Assessment Order</i>	<i>Rs.12,18,863</i>
<i>Addition as discussed in Para No.7 of the Assessment Order</i>	<i>Rs,9,199</i>
<i>Addition as discussed in Para No.8 of the Assessment Order</i>	<i>Rs.2,07,696</i>
<i>Addition as discussed in Para No.9 of the Assessment Order</i>	<i>Rs.15,74,272</i>

The addition of Rs.84,50,000/- was made invoking the provisions of section 2(22)(e) of the Act, Rs.2,07,696/- was made invoking the provisions of section 14A and the other additions were made by way of disallowance of expenses claimed in the profit and loss account invoking the provisions of section 37 of the Act.

3. At the end of the First Appellate proceedings, on the issue of addition of Rs.84,50,000/-, CIT(A) granted part relief of Rs.60,00,000/- holding that the same was paid by the company in the normal course of business activities of the assessee. He also confirmed the addition made u/s.14A of the Act. On other issues, CIT(A) granted part relief.

4. Aggrieved with the relief granted by the CIT(A), the Revenue is in appeal. Further, aggrieved with the decision of the CIT(A) in confirming

of additions partly or fully, the assessee is in appeal with the grounds mentioned in the order.

We shall take up the assessee's appeal first.

ITA No.330/PUN/2015 – By Assessee
A.Y. 2010-11

5. Assessee raised the following grounds of appeal :

“On facts and circumstances of the case and in law,

1. *The Ld.DCIT, Circle-3, Pune, has erred in assessing income under the pretext of section 2(22)(e) of the Act and the Ld.CIT(A)-3, Pune has erred in confirming the same to the extent of Rs.24,50,000/-.*

2. *The Ld.DCIT, Circle-3, Pune, has erred in disallowing expenses of Rs.2,07,696/- under the pretext of section 14A of the Act and the Ld.CIT(A)-3, Pune has erred in confirming the same.*

3. *The Ld.DCIT, Circle-3, Pune and the Hon.CIT(A)-3, Pune has erred in ignoring evidence or records and making addition which are beyond provision of the Income Tax Act, 1961 (the Act).*

4. *The appellant craves leave to add, amend, alter, omit or substitute any of the grounds of appeal.”*

6. Ground No.1 by the assessee relates to confirmation of addition of Rs.24,50,000/-. It is a part of the gross addition of Rs.84,50,000/- made by the AO u/s.2(22)(e) of the Act. CIT(A) confirmed only addition to the extent of Rs.24,50,000/-.

Mentioning that this amount of Rs.24,50,000/- has two segments, Ld. Counsel for the assessee submitted that Rs.15 lakhs was received by the assessee towards the security deposit in connection with the letting of his property to the company DIDPL. Assessee owns a property which was let out to the company at the monthly rent of Rs.10,000/- and which works out to Rs.1,20,000/- per year. Rs.15 lakhs was the security deposit. As per the assessee, the same is done in normal course and therefore, this transaction is outside the scope of section 2(22)(e) of the Act. AO allowed only Rs.50,000/- before

disallowing the rest of the amount of Rs.14,50,000/- u/s.2(22)(e) of the Act. CIT(A) confirmed the same. Further, on the other segment of Rs.10 lakhs, Ld. Counsel assessee submitted that a sum of Rs.10 lakhs was received from Dhariya Construction Pvt. Ltd. on 04-12-2009. In this connection, without going into the facts and arguments, Ld. Counsel fairly submitted that this part of addition is not seriously contested by the assessee. Therefore, the Tribunal may decide the issue as per the law. Otherwise, this part of the addition confirmed by the CIT(A) is 'not pressed'.

7. On considering the submission of the Ld. Counsel for the assessee, we perused the order of CIT(A) and find this issue has been discussed by the CIT(A) in Para No.4 with its sub-paras and confirmed this part of Rs.10 lakhs by stating the following :

“4.6.1 Further, the appellant has also not been able to justify the payment received of Rs.10 lacs from the company DCPL and also not able to bring on record such material in support of the claim to show that the amount received was towards the business of the company”

4.6.2 Thus, in the light of the foregoing discussion the addition made by the Assessing Officer of Rs.24.50 lacs is liable to be upheld. In the result out of the total addition made by the Assessing Officer of Rs.84,50,000/-, addition to the extent of Rs.24.50 lacs is upheld and the remaining amount of Rs.60 lacs is directed to be deleted.”

From the above, invoking of provisions of section 2(22)(e) of the Act in respect of Rs.10 lakhs is concerned, it is agreed position that the same is not pressed by the Ld. Counsel before us. Accordingly, we hold the order of CIT(A) on the addition of Rs.10 lakhs is fair and reasonable on this issue. Thus, this part of Ground No.1 raised by the assessee is dismissed.

7.1 Regarding the addition of Rs.14,50,000/-, we find the same is received in the name of security deposit in the context of letting out of

the property of the assessee. AO disallowed only Rs.50,000/- towards security deposit and added the balance amount of Rs.14,50,000/-. Though the AO is not right person to decide what amount constitutes the right amount of security deposit for letting of the property, assessee's explanation that the same was received in the normal course of business activity requires special attention. It is an admitted fact that the business of the assessee is not letting out of the properties. Notwithstanding to the same, it may be true that the requirement of payment of security deposit do exist in the free market of letting out of the property. Interpreting the deeming provisions strictly, we are of the opinion that the payment of Rs.15 lakhs received by the assessee is outside the provisions of section 2(22)(e) of the Act. Therefore, we are of the opinion that the assessee should be entitled to relief of Rs.14,50,000/- on this aspect. To that extent, the finding of CIT(A) given in Para No.4.6.2 stands reversed. Thus, Ground No.1 by the assessee is partly allowed.

8. The second issue raised by the assessee in Ground No.2 relates to disallowance of exempt income earned by the assessee u/s.14A of the Act amounting to Rs.2,07,696/-.

Relevant facts on this issue include that assessee earned dividend and interest on PPF as exempt income. From the profit and loss account of the assessee, AO noticed that assessee made expenditure under several heads which are indirectly related to earning the exempt income. Eventually, the AO, relying on the decision of Mumbai Bench of the Tribunal in the case of Daga Capital Management Services Ltd. and others quantified the expenditure attributable to earning of exempt income at Rs.2,07,696/- and added the same to the assessed income. CIT(A), after elaborately discussing the law laid down in the Finance Act

2001, Finance Act, 2006 and the scope of Rule 8D of the I.T. Rules, came to the conclusion that the assessee has undisputedly earned exempt income and hence, section 14A is applicable in the case of the assessee. While reaching the said conclusion, he relied on the judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT 328 ITR 81 (Bom.) and the decision in the case of ACIT Vs. Champion Commercial Co. Ltd. 139 ITD 108 (Kol.). Eventually, the CIT(A) confirmed the said disallowance made by the AO. Aggrieved with the same, the assessee is in appeal before us.

9. Before us, on this issue, Ld. Counsel for the assessee submitted that the disallowance made by the AO and confirmed the CIT(A) exceeded the exempt income quantitatively. For this purpose, assessee relied on the decision of Mumbai Bench of the Tribunal in the case of Daga Global Chemicals Pvt. Ltd. Vs. ACIT 82 taxmann.com 254 (Mumbai-Trib.) as well as the decision of Delhi Bench of the Tribunal in the case of M/s. Amar Packaginig Pvt. Ltd. Vs. ITO - ITA No.2358/Del./2013, dated 29-04-2016 and submitted that the disallowance if any cannot exceed the exempt income earned by the assessee.

10. Ld. DR for the Revenue supported the orders of AO/CIT(A).

11. On hearing both the parties on this issue, we find the issue requires to revisit the file of AO in the light of the decision of Mumbai Bench of the Tribunal in the case of Daga Global Chemicals Pvt. Ltd. Vs. ACIT (supra) wherein the Tribunal has observed (Held portion) as under :

“Held that no borrowed funds were utilised for earning the exempt income by the assessee and further the dividend were directly credited in the bank account of the assessee and no expenditure was claimed. Further, the assessee only received Rs.1,82,362/- as dividend income,

*therefore, there is no question of disallowance of Rs.14,58,412/- by invoking section 14A read with rule 8D under the facts available on record. Further, **disallowance under section 14A read with rule 8D cannot exceed the exempt income.***

Considering the same, we are of the opinion that the issue should be remanded to the file of AO for applying the aforesaid ratio of the decisions/judgments. Accordingly, we direct the AO to follow the directions given by the Tribunal (supra) and re-adjudicate the issue in the light of the same and other decisions if any as per law. Accordingly, this issue raised by the assessee is allowed for statistical purposes.

12. In the result, the appeal of the assessee is partly allowed for statistical purposes.

We shall now take up appeal of the Revenue.

ITA No.754/PUN/2015 – By Revenue
A.Y. 2010-11

13. Grounds raised by the Revenue are extracted as under :

“1. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting addition at deemed dividend u/s 2(22)(e) to the extent of Rs. 60 lacs received from M/s. Dhariya Infrastructure Development Pvt. Ltd. (DIDPL) in which his share holding is 23.04% without appreciating the fact that the so called mobilization advance of Rs. 60 lacs is nothing but a loan.

2. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance made by the AO of Rs. 15,74,272/- on account of payment to six labour contractors relying on the decisions of Hon'ble ITAT, Pune in the assessee's own case for A.Y. 2006-07 to 2008-09 even though the issue involved in those years is different from the issue involved for the assessment year under consideration.

a. On the facts and circumstances of the case, the Ld. CIT(A) erred in appreciating that the issue involved in the decisions of Hon'ble ITAT, Pune in the assessee's own case for A.Y. 2006-07 to 2008-09 was of ad-hoc disallowance of cash expenses incurred for labour payments and others and which are supported by self made vouchers only, whereas the issue involved for AY 2010-11 is disallowance of expenses to six labour contractors for the reason that genuineness of payments cannot be verified by the AO due to non-furnishing of the detailed address of such contractors by the assessee.

b. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance made by the AO of Rs.15,74,272/- on account of payment to six labour contractors even though the assessee has neither submitted the address of the six sub-contractors nor their PANs

and consequently, it was not possible for the AO to verify genuineness of payments to such contractors.

c. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance made by the AO of Rs.15,74,272/- on account of payment to six labour contractors even though the assessee has not discharged onus on him to prove the genuineness of such expenses incurred.”

14. Ground No.1 relates to the relief of Rs.60 lakhs granted by the CIT(A) holding that the same is outside the scope of section 2(22)(e) of the Act.

Briefly stated relevant facts are that the assessee owns agricultural lands and the same were to be sold to DIDPL, the company in which the assessee is a Director. To that extent, an agreement was reached between the parties on 24-08-2009 (page 20 of the paper book). As per the agreement, the said agricultural land requires to be converted into Non-Agricultural land by the assessee and obtain the requisite permissions in this regard for use of the said land for erecting a stockyard for the company. Subject to the said condition, assessee would receive a sum to the tune of Rs. 1 crore depending on the progress of work. The first instalment of Rs.50 lakhs would be paid immediately. These advances would be converted into the deposit and advance rent on completion of the development work. It is also mentioned that assessee should refund the same with interest, in case of non-compliance to the condition by the assessee. During the year, assessee received Rs.60 lakhs from DIDPL. In the assessment proceedings, the same was treated by the AO as loan or advance in violation of the provisions of section 2(22)(e) of the Act. Assessee submitted that the said amounts were received in the normal course of the business activities of the assessee and the same was rejected by the AO. Further, assessee submitted that the said transaction of sale of lands did not fructify due to failure on part of the assessee in obtaining

necessary permissions from the State Govt. Further also, assessee submitted that the said amount of Rs.60 lakhs was refunded eventually with interest due to non-compliance to item No.10 of the terms and conditions of the agreement. In such circumstances, as per assessee, the provisions of section 2(22)(e) of the Act should not be invoked.

15. Appreciating the above facts, CIT(A) granted relief to the assessee. Aggrieved with the same, the Revenue is in appeal before us.

16. During the proceedings before the Tribunal, Ld. DR for the Revenue submitted that the facts relating to application to Govt. authorities for conversion of agricultural lands into NA lands is not on record. Referring to page 24 of the paper book, Ld. DR submitted that the same relates to application made by Shri Mohan Riswadkar and not the assessee under consideration. The same does not indicate the eventual failure on part of the assessee to obtain the NA lands permission. He further submitted that the facts relating to refunding of the amounts are also not on record. Even before us, assessee could not demonstrate the date of repayment of said sum of Rs.60 lakhs to the DIDPL. Without going into the integrity of these facts and transactions, Ld. DR opined that the relief granted by the CIT(A) to the assessee is premature.

17. On the other hand, Ld. Counsel for the assessee relied heavily on the order of the CIT(A) as well as referred to the relevant papers in the paper book.

18. We heard both the parties and perused the orders of the Revenue and the paper book filed before us. It is an admitted fact that the assessee owns certain lands and the said lands were to be sold to DIDPL which is engaged in sale of earth moving equipment of L&T

Komatsu & L&T Case Equipment Pvt. Ltd. This company is a dealer for 18 districts of Maharashtra and it has a proposal to develop stock yard, workshop, parts outlet etc. For the said purpose, the company selected a land owned by Shri Mukund Dhariya, the assessee who is the proprietor of Aryan Construction. Assessee offered his land situated at Gut No.35 of Village Maan for the said purpose. It is an undisputed fact that assessee received Rs. 60 lakhs as advance and is a director of the company. However, he argues that the said amount is received not as a shareholder from the company but in the normal course of business activities of the assessee.

On hearing both the parties, we find the assessee's business is not sale of agricultural lands after obtaining the permissions. He is the proprietor of Aryan Construction engaged in the construction activities. We do not have the financial statements of the assessee for the year under consideration. Though the explanation of the assessee includes non-compliance of the conditions set by the company in the agreement, the documentation is not clearly made out before the CIT(A) or even before us. Further, the argument relating to the refund of the money with interest was also not demonstrated conclusively before us. Further, it is not clear as to how the said payment of Rs.60 lakhs by the company to the assessee constitutes payment in normal course of business when the assessee's business is not sale of lands after obtaining the requisite permissions. It may be a case of payment in normal transactions but we are of the opinion that the same cannot be considered as payment in the normal course of business activities of the assessee. The sale of land cannot be considered as business activity of the assessee on the given facts. However, we are of the opinion that this aspect requires some more scrutiny of the relevant documents.

Therefore, assessee is directed to furnish the same before the CIT(A). We direct the CIT(A) to entertain the same and re-adjudicate the issue afresh after granting reasonable opportunity of being heard to the assessee. Accordingly, Ground No.1 raised by the Revenue is allowed for statistical purposes.

19. Ground No.2 by the Revenue with its sub-grounds revolve around the allowability of claim of expenditure of Rs.15,74,272/- incurred by the assessee.

Relevant facts include that assessee paid the said sum to six labour contractors. According to the information, these six contractors bear PAN numbers, paid taxes on the receipts. However, it is undisputed fact that the assessee did not further the requisite addressed to the AO for scrutiny as to the genuineness of the payments. AO disallowed the same. However, CIT(A) granted relief relying on the order of the Tribunal in assessee's own case in ITA No.516/PN/2011, dated 09-08-2002 for the A.Y. 2006-07.

20. Bringing our attention to the contents of Para No.7 of the order of the Tribunal in assessee's own case (supra), Ld. DR for the Revenue submitted that the issue raised in Ground No.2 – making payments to the sub-contractor, is different from the labour charges incurred by the assessee directly in connection with the business activities. To that extent, the decision of the Tribunal relied on by the CIT(A) is on wrong facts. Therefore, Ld. DR for the Revenue requested for remanding this issue to the file of CIT(A) for fresh adjudication.

21. Per Contra, Ld. Counsel for the assessee relied on the order of CIT(A). He however submitted that the payments made by the assessee in that A.Y. 2006-07 were not direct payments to labour unlike the

payments through the contractors in the year under consideration. He argued that furnishing of PAN numbers of the sub-contractors is good enough for the AO to conduct investigation into the genuineness of the transactions, if he so desires.

22. We heard both the parties on this issue and find it is a case of failure in discharging of onus by the assessee when claim of deduction is made. In our view, the assessee has not discharged the same and did not furnish the basic details relating the payments to the sub-contractors. Assessee is under obligation to demonstrate that the said parties received the payments, income-tax details of the said payees, particulars of the TDS etc. For this purpose, we find it relevant to remand this issue raised vide Ground No.2 with its sub-grounds to the file of CIT(A) for fresh adjudication. CIT(A) shall grant reasonable opportunity of being heard to the assessee as per law.

23. In the result, appeal of the Revenue is allowed for statistical purposes.

24. To sum up, appeal of the assessee is partly allowed for statistical purposes and the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the open court on this 11th day of April, 2018.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 11th April, 2018
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-3, Pune
4. CIT-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune