

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR**

BEFORE SHRI N.K. BILLAIYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 214/RPR/2014
Assessment Year: 2009-10**

The Dy. Commissioner of Income Tax-1(1), Central Revenue Building, Civil Lines, Raipur (C.G.)	Vs.	Shri Ismail Mohammed, 24/347, Dr. Virdhi Gali Marg, Jawahar Nagar, Raipur (C.G.) PAN: AISPM8617R
(Appellant)		(Respondent)

Revenue by : Sheetal Shashwat Verma (DR)
Assessee by : None (Written submission)

Date of Hearing: 05/03/2018
Date of Pronouncement: 06/06/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against order dated 30.07.2014 passed by the Ld. Commissioner of Income Tax (Appeals), Raipur, for the assessment year 2011-12, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed by the AO u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').s

2. Brief facts of the case are that the assessee engaged in the business of trading of crackers, filed its return of income for the assessment year under consideration declaring the total income of Rs. 22,26,680/-. The case was selected for scrutiny. Accordingly, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response to the said notices the authorized representative (AR) of the assessee appeared and filed written

submissions and also submitted the books of account bills and vouchers, bank statement as asked by the AO. It was noticed that the assessed had given interest free loan of Rs. 20,00,000/- to his wife and Rs. 5,00,000/-, to his daughter. The assessee had further given interest free loan and advances to the four parties mentioned in the assessment order amounting to Rs. 15,50,764/-. On being asked the AR submitted that since the assessee had sufficient capital of his loan to give loans and advances, no disallowance is called for as the advances were given out of the interest free funds and accumulated capital available with the assessee amounting to Rs. 76,79,000/- as on 01.04.2010. However, the AO rejecting the contention of the assessee made addition of Rs. 5,67,107/- i.e. @ 14% of the total amount of advances made. The AO further made addition of Rs. 31,26,454/- u/s 40(a)(ia) of the Act on interest and finance charges of Rs. 31,26,454/- paid to various Non Banking Financial Companies (NBFC) for failure to deduct TDS. The AO further made addition of Rs. 22,897/- made on account of disallowance made out of the expenses claimed by the assessee. The AO after making the aforesaid additions determined the total income of the assessee at Rs. 59,43,140/-.

3. Aggrieved by the assessment order passed by the AO, the assessee challenged the same before the Ld.CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal and deleted the aforesaid additions. Against the said order, the revenue is in appeal before the Tribunal.

4. The revenue has challenged the impugned order passed by the Ld. CIT(A) on the following effective grounds:-

1. *“Whether in law and on facts & circumstances of the case, the learned CIT (A) has erred in deleting the addition of Rs. 5,67,107/- made by the AO on account of interest on interest free loans and advances given for non business purposes?”*
2. *“Whether in law and on facts & circumstances of the case, the learned CIT (A) has erred in deleting the addition on account of disallowance u/s 40(a)(ia) of the IT Act, 1961 of interest and finance charges of Rs. 31,26,454/- paid to various NBFCs for failure to deduct TDS?”*
3. *“Whether in law and on facts & circumstances of the case, the learned CIT (A) has erred in deleting the addition of Rs. 22,897/- made by the AO on account of disallowance made out of various expenses?”*
4. *The Order of the Ld. CIT (A) is erroneous both in law and on facts.”*
5. This case was fixed for hearing on 05.03.18. On the said date the case was called out for hearing, however, none appeared on behalf of the assessee. Since, the assessee had already submitted written submissions dated 29.05.2014, we decided to dispose of the appeal on the basis of the material on record including the written submissions of the assessee after hearing the departmental representative (DR).
6. The first ground of appeal relates to the addition of Rs. 5,67,107/- made by the AO on account of interest free loan and advances given for non business purposes. Before us, the Ld. Departmental Representative (DR) relying on the assessment order submitted that once the assessee claims any interest deduction in books of account, the onus will be on the assessee to satisfy that the loans were raised for the purpose of

business. If in the process of verification it transpires that the assessee has advanced certain funds to sister concerns charging no interest, the onus is on the assessee to justify the same. In the present case since the assessee has failed to discharge the onus, the Ld. CIT(A) has wrongly deleted the addition made by the AO.

7. On the other hand the assessee relying on the order passed by the Ld. CIT(A) has taken the plea in its written statement that since, he had sufficient capital available with him to discharge his pious duties. Moreover, it his prerogative to decide the manner in which he wants to conduct his business affairs and decide the end use of his funds. The assessee has relied on various judgments of the Hon'ble High Courts and the Tribunal.

8. We have perused the material on record including the cases relied upon by the assessee and the authorities below in the light of the submissions of the Ld DR and the plea taken by the assessee in his written submissions. The Ld. CIT(A) has decided this issue on the basis of the principles of law laid down by the various High Courts. The relevant portion of the order reads as under:

“12. The jurisdictional High Court of Chhatisgarh, in case of JCIT Vs. Beekay Engineering Corporation (2010) 325 ITR 384 (CG) has held that “Assessee firm had given interest-free advances to two members of HUF partner- It is evident from the balance sheet of the assessee firm that there was sufficient fund in the account of the HUF as found by the Tribunal-Besides, profit of Rs. 46,81,943 accrued to the firm in the relevant financial year- In these circumstances, the findings recorded by the Tribunal that no evidence is available on record to show that the borrowed funds were not utilized by the assessee for its

own business but were diverted as advance to members of the HUF free of interest and, therefore, there is no justification in making part disallowance out of interest paid on borrowed funds". The Hon'ble Mumbai High Court in case of CIT Vs. Reliance Utilities & Power Ltd. 313 ITR 340 (Mum) has held that "The principal therefore would be that if there are funds available both interest free and overdraft and/or loan taken, then a presumption would arise that investments would be out of the interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investment.: Hon'ble Allahabad High Court in case of CIT Vs. Radico Khaitan Ltd. 274 ITR 354 (All), Hon'ble Delhi High Court in case of CIT Vs. Tin Box Co. 260 ITR 637 (Del) and Hon'ble Madras High Court in case of CIT Vs. South India Corporation (Agencies) Ltd. 290 ITR 217 (Mad) are also in favour of the appellant. Looking to the facts and circumstances of the case as also decisions cited above, the disallowance made by the A.O. cannot be sustained. Hence, the disallowance is deleted."

9. We notice that the AO has not pointed out any evidence to establish that the borrowed funds were not utilized by the assessee for its own business but diverted by advancing interest free loans. The AO has not disputed the facts that the loans in question were advanced to his family members to meet out their temporary needs. It is also not in dispute that the assessee had interest free funds and accumulated capital to the tune of Rs. 76,79,000/- during the financial year relevant to the assessment year under consideration. Under these circumstances, we do not find any infirmity in the finding of the Ld. CIT(A). Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the department.

Vide ground No. 2 the revenue has challenged the action of the Ld. CIT(A) in deleting the addition made u/s 40 (a)(ia) of the Act. The Ld. DR submitted that since the assessee has failed to prove that tax at source was deducted while making payment towards interest to the non-banking financial companies, the Ld. CIT(A) has wrongly deleted the addition. On the other hand the assessee relying on the decision of Hon'ble Delhi High Court in the case of CIT vs. *Ansal Landmark Township Pvt. Ltd.*, 377 ITR 365 has taken the plea in his written statement that if the recipient has taken into account the related payments in its computation of income, no disallowance can be made u/s 40(a)(ia) of the Act. The assessee has further contended before the Ld. CIT(A) that he has filed the required certificate from the statutory auditor to show that the recipients have shown the amount in their financial statements.

10. We have perused the material on record in the light of the contentions of the Ld DR and the plea taken by the assessee in his written statement. The Hon'ble Delhi High Court in *Commissioner of Income Tax Vs. Ansel Landmark Township* (supra) has decided the identical issue involved in this case in favour of the assessee holding as under:-

“11. The first proviso to section 201(1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on this credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such a resident has furnished his return of income under section 139 of the Act. No doubt, there is a mandatory requirement under section 201 to deduct tax at

source under certain contingencies, but the intention of legislature is not to trade the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to section 201(1). The insertion of the second proviso to section 40(a)(ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The fact of the legal fiction created thereby is to treat the Assessee is a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the proviso to section 40(a)(ia) and section 201(1) of the Act is that as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the revenue that the payee has filed return and offered the sum received to tax.”

11. Since, the issue involved in the present case is covered by the judgment of the Hon'ble Delhi High Court, we upheld the findings of the Ld., CIT (A) in principle. However, we are of the considered view that the AO should verify the contention of the assessee raised before the Ld. CIT(A). We accordingly send this issue back to the AO for a limited verification on the aspect as to whether the recipients of the payments have included the same in their computation of business income offered to tax and delete the addition in accordance with the law laid down by the Hon'ble Delhi High Court in the aforesaid judgment.

12. Vide ground No. 3, the revenue has challenged the action of Ld. CIT (A) in deleting the addition of Rs. 22,897/- made by the AO on

account of disallowance made out of various expenses on lump sum basis. The Ld. DR submitted before us that since the assessee has not maintained the log book and proper bill vouchers for the expenses claimed, the Ld. CIT (A) has wrongly deleted the addition made on account of disallowance of 1/4th of the total expenditure claimed by the assessee under different heads. On the other hand, the assessee has taken the plea in his written statement that since the Ld.CIT (A) has deleted the relief by following the decision of Nagpur Bench there is no merit in the contention of the revenue.

13. We have perused the material on record and also gone through the cases relied upon by the authorities below and the assessee before the Ld. CIT(A). The Ld. CIT (A) has deleted the addition in question holding as under:-

“23. I have carefully gone through the assessment order and submissions of the appellant. In Om prakash Joshi vs. Income Tax Officer (2009) 123 TTJ (Jd); (2009) 23 DTR 426 on identical issue AT made a lump sum disallowance of Rs. 1 lakh out of conveyance expenses, repairing and maintenance expenses, travelling expenses and depreciation on the ground that personal element in the expenditure cannot be ruled out- Not justified-AO himself has noted in the assessment order that the expenses have been incurred for the purpose of the appellant’s business-Accounts of the appellant have been duly audited under s. 44AB and the auditors have certified that no personal expenses have been debited to the P&L a/s-AO has made the disallowance only on assumptions and presumptions without coming across any un-vouched expenses. Disallowance was held unwarranted and unreasonable. Hence, the disallowance is deleted”.

14. Since, the Ld. CIT (A) has deleted the addition by following the decision of the ITAT in the case of *Om Prakash Joshi vs. ITO (supra)*, we do not find any reason to interfere with the same. We therefore uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2011-2012 is partly allowed for statistical purposes.

Order pronounced in the open court on 6th June, 2018.

Sd/-

(N.K. BILLAIYA)

ACCOUNTANT MEMBER

Raipur, दिनांक Dated: 06/06/2018

Alindra, PS

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय
अधिकरण, Raipur / DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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