

आयकर अपीलीय अधिकरण “C” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 3222 & 3223/Mum/2014

(निर्धारण वर्ष / Assessment Year 2007-08)

Shri Chamanlal Awtaney 2001, E Wing, 'XX' Clusive, Whispering Palms, Building No, 9, Lokhandwala Complex, Kandivali East, Mumbai-400 101, Maharashtra	Vs.	The Asst. Commissioner of Income Tax, Circle 15(3), Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. ADJPA0657M		

अपीलार्थी की ओर से / Appellant by	:	Shri R.C. Jain, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Arvind Kumar, DR

सुनवाई की तारीख / Date of hearing:	17.06.2019
घोषणा की तारीख / Date of pronouncement :	17.06.2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

These two appeals filed by the assessee are arising out of the orders of the Commissioner of Income Tax (Appeals)-28, in short CIT(A), in appeal No. CIT(A)-28/ACIT-15(3)/343,20/12-13& 10-11 dated 14.03.2014, 26.02.2014. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle 15(3), Mumbai (in short



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ACIT/ITO/ AO) for the A.Y. 2007-08 vide order dated 17.12.2009, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act'). The penalty was levied by ACIT, Circle 15(3) under section 271(1)(c) of the Act vide order dated 27.03.2012.

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2. At the outset, it is noticed that this appeal is time barred by 1 days and assessee has filed condonation petition supported by affidavit. The learned Counsel for the assessee stated that the assessee received the order of CIT(A) on 06.03.2014 and last date for filing of this appeal before Tribunal was 04.05.2014, whereas, actually, the appeal was filed before the Tribunal on 06.05.2014. Thereby, there is a delay of 1 day. The learned Counsel for the assessee stated the reasons that he received the order on 06.03.2014 and due to his ill health and severe financial crisis for which he could not hand over the same to the learned Counsel for further action. The learned Counsel for the assessee drew our attention to the affidavit filed by the director and the relevant clause 1 to 4 states the reason and the same read as under: -

"1. That certain additions/disallowances were made in my Income Tax Assessment for AY 2007-08 and an appeal was filed against those before Commissioner of Income Tax Appeal -28 by me. The said CIT (A) passed an order on 26-02-2014 which was received by me on 05-03-2014 at my residence. However, due to my ill health and severe financial crisis I could not



hand over the same to my counsel for further action.

2. *That subsequently upon realizing the implication of the said order of CIT(A)-28, I handed over the same to my counsel somewhere around last week of April 2014 who then filed an appeal before Hon. ITAT on 06-05-2014.*

3. *That I realized that there was a delay of ONE day in filing the appeal before Hon. ITAT which was due to my ill health and severe financial crisis.*

4. *That I confirm that there was no malafide intention behind this delay and I will be highly obliged if this delay of one day is condoned by the Hon. Bench.”*

3. When, these reasons were confronted to the learned Sr. DR, he fairly conceded the position.

4. After hearing both the sides and going through the reasons that the reasons stated by the learned counsel for the assessee is sufficient and reasonable. Hence, we condone the delay and admit the appeal.

5. The first issue in this appeal of assessee is against the order of CIT(A) sustaining addition made by AO on account of low gross



profit ratio at Rs. 15,84,410/-. For this assessee has raised the following ground No. 1: -

“1. The authorities below have erred in making addition / sustaining addition of ₹ 15,84,410/- on account of low gross profit ratio.”

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the assessee is engaged in the business of distribution of paint and hardware items under the proprietary concerns of M/s 'Rang De Basanti'. During the year under consideration, the assessee has declare sales at Rs. 15,84,41,030/- as reflected in the trading account and declared gross profit at Rs. 15,97,039/-. This constitutes gross profit ratio of 1.008%. The net profit declared by the assessee at Rs. 9,26,060/-. The closing stock of the goods bought and sold by the assessee during the year on 31.03.2007 was to the tune of Rs. 1.43 crores. The AO required the assessee to explain the low gross profit ratio and also file the details of statements, sale and purchase, item wise bills for the entire year. For this, show cause notice was issued to the assessee. No explanation was furnished by the assessee, hence, the AO made addition of gross profit to the extent of extra 1% on the turnover of the assessee. Thereby, the AO took the gross profit ratio at 2.008%. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) also confirmed the action of the AO.

7. We noted from the facts of the case and argument of the learned counsel for the assessee as well as the learned Sr. DR that the assessee's books of account have been audited under the



Companies Act and the Income Tax Act but no defects have been found in the books of account. Even the profit ratio of the earlier years was ranging between 1 to 1.5%. Even, the closing stock of goods was at Rs. 1,43,45,512/- as against the total turnover of Rs. 15,84,41,030/- which comes to 1 : 12 ratio. In the entirety of facts, we noted that there is no reason for enhancing the profit rate in the absence of rejection of book results. It is admitted fact that the AO has not rejected the books of account nor invoked the provisions of section 145 of the Act. Even the facts clearly reveal that the profit rate ratio declared by the assessee is reasonable as compared to earlier year. Hence, we are of the view that the addition made by AO is without any basis and deleted.

8. The second issue in this appeal of assessee is against the order of CIT(A) confirming the addition made by AO by invoking the provisions of section 2(22)(e) of the Act amounting to Rs. 26 lacs and further, the CIT(A) enhancing the addition at Rs. 1,15,52,948/-. For this, assessee has raised the following ground No. 2 and 3: -

“2. The authorities below have erred in making addition/ sustaining addition of ₹ 26,00,000/- under section 2(22)(e).

3. The authorities below have erred in enhancing the addition under section 2(22)(3) to ₹1,15,52,948/-.”

9. Brief facts are that during the course of assessment proceedings the AO noticed that the assessee is a substantial holder of Pipely Textiles & Chemicals Pvt. Ltd. (PTCPL), which has



accumulated profit of Rs. 2,66,61,706/- at the end of financial year 06-07. Hence, the AO treated the debt owned by the assessee to the said company amounting to Rs. 26 lacs as deemed dividend falling under the provisions of section 2(22)(e) of the Act. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) going through the ledger account of the assessee in the books of PTCPL noted that there are further loan amounts to the extent of Rs. 93,25,926/- and therefore, he enhanced the amount. The relevant chart is reproduced in the order of CIT(A) i.e. the trading entries, advances, other receipt of payments of business and expenditure. The relevant ledger account has already been reproduced in the order of CIT(A) at page 15 and 16, which need not to reproduce again. From the chart reproduced in the order of CIT(A), it is clear that these amounts are of trading transaction or business transactions. Even the deposits are also on account of the business transactions. We noted that this issue is covered in favour of assessee and against Revenue by the decision of Bombay High Court in the case of CIT vs. Nagindas M. Kapadia [1989] 177 ITR 393 (Bombay), wherein it is held as under:-

"The only question of law referred to us at the instance of the department in this reference reads thus :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in computing the 'dividend' under section 2(22)(e) of the Income-tax Act, 1961, restricting 'advances or loans' to cash transactions only and accordingly



determining such dividend at Rs. 28,500 and Rs. 10,000 respectively ?"

2. It is common ground that the assessee is a shareholder in the company styled as Maganlal Chhaganlal (P.) Ltd. and 'is a person who has substantial interest in the company' for the purpose of section 2(22)(e) of the Income-tax Act, 1961. He also carries on a proprietary business in the name and style of Rainbow Paints. The company maintains a running account in the name of Rainbow Paints and during: the previous years relevant for the assessment years 1968-69 and 1969-70, the years involved herein, the running account disclosed cash payments by the company to the assessee at Rs. 1,31,672 and Rs. 3,86,000 in the respective years. The ITO held that the payments would be deemed dividend income within the meaning of section 2(22)(e). The AAC reduced the addition to Rs. 26,262 and Rs. 40,675 which represented the peak of the payments in the two years. The Tribunal has, on going through the details of the account, found that payments other than the payments of Rs. 28,500 in the assessment year 1968-69 and other than Rs. 10,000 in the assessment year 1969-70 were made as advances towards the purchases to be made by the company from the assessee. Accordingly, the Tribunal held that



only the sum of Rs. 28,500 in the assessment year 1968-69 and Rs. 10,000 in the assessment year 1969-70 represented payments and advances within the meaning of section 2(22)(e) and could be treated as deemed dividend income.

3. Shri Bhatia, the learned counsel for the department has not disputed the finding of the Tribunal in this behalf. If the finding is not in dispute, the answer to the question is obvious because it is only the payments and advances to the extent of accumulated profits that can be treated as loans and advances within the meaning of section 2(22)(e) and this is what the Tribunal has done.”

10. In view of the above, we are of the view that the transactions in the ledger account of the assessee with PTCPL giving rise to commercial transactions, and trading transactions and deposit on account of advances against goods, which is purely commercial in nature and nothing else. Hence, we delete the addition and allow the appeal of the assessee.

11. The next issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules. For this assessee has raised the following ground No. 4: -



“4. The authorities below have erred in disallowing/ sustaining the disallowance of ₹ 2,91,165/- u/s 14A r.2. Rule 8D.”

12. At the outset, the learned Counsel for the assessee stated that the assessee has not earn any dividend income in this year and hence, no disallowance under section 14A of the Act can be made. The learned Counsel for the assessee relied on the decision of Hon'ble Bombay High Court in the case of Pr. CIT vs. Ballarpur Industries Limited in Income Tax Appeal No. 51 of 2016, wherein this issue has been considered and finally following the judgment of Hon'ble Delhi High Court in the case of Cheminvest Limited vs. CIT (2015) 378 ITR 33 (Delhi) held as under: -

“On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds that the expression “does not form part of the total income” in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal



held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case, the Authorities held that since the investments made by the assessee in the sister concerns were not the actual income received by the assessee, they could not have been included in the total income.”

13. When this was confronted to the learned Departmental Representative he could not controvert the above factual position

14. As the issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Ballarpur Industries Limited (supra), we delete the disallowance and allow this issue of assessee's appeal.

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15. At the outset, it is seen that the penalty levied by the AO under section 271(1)(c) of the Act in respect to addition made on account of the following: -

“a) Addition on account of estimation of gross profit at additional 1% of the turnover ₹ 15,84,410/-.



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d) Disallowance u/s 14A ₹ 2,91,165/-.”

16. Since, we have already adjudicated the assessee's appeal on merits and additions are deleted, the penalty will not survive. Hence, the orders of the lower authorities are reversed and the penalty is deleted.

17. **In the result, both, the appeals of the assessee are allowed.**

Order pronounced in the open court on 17.06.2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 17.06.2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

आदेश की 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, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai