

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI LALIET KUMAR, JM

आयकर अपील सं. / ITA No. 1440/PUN/2015

निर्धारण वर्ष / Assessment Year : 2012-13

The Deputy Commissioner of Income Tax,
Circle-1(2), Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Dhariya Construction Pvt. Ltd.
Plot No.43, Indu Niwas,
Shivaji Housing Society,
Shivaji Nagar, Pune-411 016
PAN: AAECA9056B

.....प्रत्यर्थी / Respondent

Assessee by : Shri Abhay Avchat

Revenue by : Shri S.P Walimbe

सुनवाई की तारीख / Date of Hearing : 10.02.2020

घोषणा की तारीख / Date of Pronouncement : 11.02.2020

आदेश / ORDER

PER LALIET KUMAR, JM :

This appeal preferred by the Revenue emanates from the order of the
Ld. CIT(Appeals)-1, Pune dated 27.08.2015 for the assessment year 2012-13
as per the following grounds of appeal on record:

“1. The order of the Ld. Commissioner of Income Tax(Appeals) is contrary to law and to the facts and circumstances of the case.

2. The Ld. Commissioner of Income Tax (Appeals) grossly erred in deleting the disallowance made by the Assessing Officer u/s.2(22)(e) of the I.T. Act of Rs.2,93,26,224/- instead of confirming the said disallowance as the assessee tried to colored in loan/advances by giving name of inter corporate deposits.

3. The Ld. Commissioner of Income Tax (Appeals) grossly erred in interpreting section 2(22)(e) of the I.T. Act as the basic conditions for treating the transaction was deposit are not satisfied.

4. The Ld. Commissioner of Income Tax (Appeals) grossly erred in relying the decision of Hon’ble Mumbai Tribunal in the case of Bombay Oil Industries Ltd. Vs. DCIT, however, the facts of the present case is not identical.

5. The Ld. Commissioner of Income Tax (Appeals) erred in passing the order by accepting the assessee’s version without giving any concrete finding and not passed a speaking order on the ground of exclusion of amount of Rs.2,53,59,490/- being cash component of investment in flat at Surat.

6. The Ld. Commissioner of Income Tax (Appeals) erred in giving the telescopic benefit to the assessee as the assessee made voluntary disclosures based on incriminating material detected during the survey action.

7. The Ld. Commissioner of Income Tax (Appeals) erred in allowing the amount of Rs.2,53,59,490/- by way of telescopic benefit as the assessee had made the disclosure without any force or coercion and confirmed by the Director many times during the assessment proceedings.

8. For these and such other grounds as may be urged at the time of hearing, the order of the Ld. Commissioner of Income Tax (Appeals) may be vacated and that of the Assessing Officer be restored.

9. The appellant craves to add, amend, alter or delete any of the grounds of appeal during the course of appellate proceedings before the Hon’bl Tribunal.”

2. The Ld. DR in respect of **Ground Nos. 2 to 4** has drawn our attention to the order passed by the Assessing Officer. The Assessing Officer had mentioned the facts at Para 11 to the following effect:

“11. On perusal of the submissions filed by the assessee vide letter dated 09.10.2014 it is seen that assessee company (Dharia Construction Pvt. Ltd.) had received loan/advances of Rs.2,93,26,224/- from M/s. Dharia Infrastructure Development Pvt. Ltd. (PAN AABCA5337L) during the year whereupon an interest amount of

Rs.3,26,224 was paid to the lender company. Further, it was noticed from the return of income for A.Y.2012-13 of the lender company that the assessee company (DCPL) was beneficial owner of 50% shares in the lender company which is such a company in which public was not substantially interested. As the assessee company had substantial shareholding/interest in the borrower company, loans of Rs.2,93,26,224/- received from M/s.Dhariya Infrastructure Development Pvt. Ltd. having reserves and surplus (General reserve and inappropriate Profits) of Rs.6,11,43,211/-, required to be treated as deemed income under section 2(22)(e) of the Act. Accordingly, the assessee was vide letter dated 13.1.2015, directed to show cause but why the figure of Rs.2,93,26,224/- by invoking the provisions of clause (e) of sub section 2(22) of the Income Tax Act, 1961 be not added to the total income for AY 2012-13.”

Thereafter, at Para 13 of the assessment order, the Assessing Officer has held as follows:

“13. On careful perusal of the submission by the assessee on the issue, I am of the opinion that the submission and decision quoted upon in the cases referred are not relevant. The facts can be understood even on the plain reading of the section 2(22)(e). The assessee is found to be default as far as the section is concerned. Accordingly, an amount of Rs.2,93,26,224/- is hereby disallowed and added back to the total income of the assessee..”

2.1 The Ld. DR further submitted that the Assessing Officer had treated the amount received by the assessee to the tune of Rs.2,93,26,224/- as loan/advances from M/s. Dhariya Infrastructure Development Pvt. Ltd. and on the said basis, the provisions of Section 2(22)(e) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) were involved and the amount was brought to the tax by the Assessing Officer.

2.2 The Ld. CIT(Appeals) had accepted the contention of the assessee by treating the amount received by the assessee as Inter-Corporate Deposit and held that it was not in the nature of loan/advances. The Ld. CIT(Appeals) relying on the decisions of Hon’ble Madhya Pradesh High Court in the case of Sharda Talkies (Firm) Vs. Smt. Madhulata Vyas AIR 1966 MP 68 and also in

the matter of Pennwalt (India) Pvt. Ltd. Vs. Registrar of Companies (1987) 62 Comp Case 112 (Bom.) had granted relief to the assessee. For the sake of completeness, the observation of the Ld. CIT(Appeals) were reproduced herein below:

“5. I have carefully considered the facts of the case as well as reply of the appellant. In this case undisputed fact remains that the amount of Rs.2,93,26,224/- received from Dhariya Infrastructure Pvt. Ltd. is in the nature of “Inter Corporate Deposit” as claimed before the Assessing Officer too. This claim remains uncontrovered by the AO in the assessment order while invoking the provisions of section 2(22)(e) of the Income Tax Act, 1961. This being so, the only question remains to be decided is whether provisions of section 2(22)(e) can be invoked in the case of “Inter Corporate Deposit”. Section 2(22)(e) clearly mentioned the term advance or loan and not deposits. Mumbai Tribunal in the case of Bombay Oil Industries Ltd. Vs. DCIT (2009)-TIOL-297, ITAT Mum. (2009) 28 SOT 383 (Mum.) has held that inter corporate deposits cannot be treated as a loan falling with the provisions of section 2(22)(e) of the Income Tax Act, 1961. The relevant portion of the order of the Hon. Mumbai Tribunal (supra.) is reproduced hereunder for the sake of clarity:

“From the above, it is clear there is distinction between deposits vis-à-vis loans/advances s. 2(22)(e) enacts a deeming fiction whereby the scope and ambit of the word dividend has been enlarged to bring within its sweep certain payments made by a company as the situations enumerated in the section. Such a deeming fiction would not be given a wider meaning that what it purports to do. The provisions would necessarily be accorded strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. The requisite condition for invoking s.2(22)(e) of the Act is that payment must be by way of loan or advances. Since there is a clear distinction between the ICDs vis-a-vis loan/advances, according to us the authorities below were not right in treating the same as deemed dividend under S. 2(22)(e) of the Act.”

Since facts of the case being identical, following the above decision of the Hon. Mumbai Tribunal, it is held that the Assessing Officer was not right in invoking the provisions of section 2(22)(e) of the Income Tax Act, 1961 in respect of deemed dividend. Accordingly, he is directed to delete the same. Thus, Grounds Nos. 1 and 2 are allowed.”

2.3. The Ld. DR further submitted before us that firstly, the Ld. CIT (Appeals) has not given basis for coming to the conclusion, the amount received from M/s. Dhariya Infrastructure Development Pvt. Ltd. by the assessee company i.e. Dhariya Construction Pvt. Ltd. were in the nature of

“Inter Corporate Deposit” and was not loan/advances. It was also submitted that the assessee company was having common Managing Director of the M/s. Dhariya Infrastructure Development Pvt. Ltd. namely Shri Mukund Dhariya and there was no formal agreement between the assessee and M/s. Dhariya Infrastructure Development Pvt. Ltd. to treat the amount as “Inter Corporate Deposit”. Further, Ld. DR submitted that the assessee was not able to establish that M/s. Dhariya Infrastructure Development Pvt. Ltd. was having sufficient/ surplus funds of its own which can be given to the assessee for the purpose of keeping it as deposit and were not borrowed funds.

3. The Ld. AR of the assessee has submitted that the amount given was in the nature of ‘Inter Corporate Deposit’ and was not loan/advances. For that purpose, the Ld. AR of the assessee has drawn our attention to the decisions relied on by the Ld. CIT(Appeals) while giving relief to the assessee.

4. We have heard the rival contentions and perused the material available on record. In the present case, the assessee company namely, M/s.Dhariya Construction Pvt. Ltd. had received loan/advances amounting to Rs.2,93,26,224/- from M/s. Dhariya Infrastructure Development Pvt. Ltd. for which during the assessment year under consideration, interest of Rs.3,26,224/- was paid to lender company. Further, it was mentioned that the assessee company was beneficial owner of 50% shares in the lender company in which the public was not substantially interested. Thus, requirements for invoking provisions of section 2(22)(e) of the Act were fulfilled as (i) the amount was received by the assessee company; (ii) the assessee company was beneficial owner of 50% shares in the lender company

i.e. M/s. Dhariya Infrastructure Development Pvt. Ltd. and therefore, it is required to be taxed in the hands of the assessee company being deemed dividend.

- 4.1 There are judicial pronouncements to distinguish deposit from loan. Loans are given at the request of borrower against interest payment. Per contra, deposits are given out of excess fund voluntarily on the proposal of the lender with interest.
- 4.2 In the present case, the assessee has not placed on record any document or agreement inviting the deposit. Leave alone such invitation, the assessee sister concern is whole depositor and the same is described as 'Inter Corporate Deposit' in the books of the assessee. There is no document placed before us for deciphering the real intention of the depositor or to find out whether it was deposit or loan and therefore, on the facts of the present case, there is requirement of taking adverse inference against the assessee.
- 4.3 From perusal of the ledger account of the depositor i.e. M/s. M/s. Dhariya Infrastructure Development Pvt. Ltd., it is noticed that the same appears to be running loan account rather than ICD account. There is no depositing documentation, no terms and conditions, no details about the interest, no details of maturity periods and no board resolution of the company for accepting the deposits were placed on record. Hence, it is not possible to infer that the depositor has given the money on his volition in the form of deposit out of his excess fund normally.
- 4.4 Further, for the purpose of treating the amount as "Inter Corporate Deposit", there has to be availability of funds with the lender which is not out of the borrowed funds. In fact, under the Companies Act, 1956, rules were framed which requires that before deposits are accepted, there should be advertisement for accepting the deposit. We are reproducing herewith Rule 58A of the Companies Act, 1956:

“58A Deposits not to be invited without issuing an advertisement.

(1) The Central Government may, in consultation with the Reserve Bank of India, prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members.

(2) No company shall invite, or allow any other person to invite or cause to be invited on its behalf, any deposit unless-

(a) such deposit is invited or is caused to be invited in accordance with the rules made under sub-section (1), and

(b) an advertisement, including therein a statement showing the financial position of the company, has been issued by the company in such form and in such manner as may be prescribed.”

4.5 In our opinion, though there is distinction between “Inter Corporate Deposits” and loan/advances, but for that purpose, the assessee was required to substantiate that the amount received by the assessee was in the form of “Inter Corporate Deposits”. As mentioned herein above, the assessee was failed to bring on record any documentary evidences except oral submission that the amount received by it was in the form of “Inter Corporate Deposit”. No evidence towards the nature of amount received by the assessee was brought on record or laid before the Ld. CIT(Appeals) or before us. No confirmations on “Inter Corporate Deposit” or Balance Sheet treating the amount of “Inter Corporate Deposit” were filed before us. Further, no terms and conditions were brought to our notice disclosing the nature of the amount received by the assessee company.

4.6 The assessee had filed ledger account of M/s. Dhariya Infrastructure Development Pvt. Ltd. (Inter Corporate Deposit) for the period 1st April, 2011 to 31st March, 2012 wherein various amounts were given by the

said M/s. Dhariya Infrastructure Development Pvt. Ltd to the assessee company between 5th April, 2011 to 31st March, 2012 and it appears from Page 21 of the Paper book annexed on record that interest paid on the deposit was amounting to Rs.2,69,260/-. However, looking into the various entries which were done by the M/s. Dhariya Infrastructure Development Pvt. Ltd, it appears that every now and then amount was transferred from M/s. Dhariya Infrastructure Development Pvt. Ltd to the account of M/s. Dhariya Construction Pvt. Ltd. like the amount of Rs.50 Lakhs was transferred to M/s. Dhariya Construction Pvt. Ltd. on 23.04.2011, Rs.10 Lakhs on 27.04.2011, another amount of Rs. 10 Lakhs on 02.05.2011, another amount of Rs.10 Lakhs 05.05.2011 and Rs.50 Lakhs on 09.05.2011 and also Rs.20 Lakhs deposited to the M/s. Dhariya Infrastructure Development Pvt. Ltd. on 09.05.2011. The entries of those various amounts received by the assessee and given back by the assessee clearly show that it was **Running Account** .

- 4.7 If we examine the issue from another angle, to find out whether the amount given by the assessee was in fact in the nature of loan/advances and was “Inter Corporate Deposit”. It is essential for the amount given as “Inter Corporate Deposits”, there should be voluntariness emanating from the lender to give the amount to the assessee and not from assessee. In this case, there being common Managing Director, amount was being transferred as and when there was requirement of fund by the assessee from the account of M/s. Dhariya Infrastructure Development Pvt. Ltd. and thereafter returned

back by the assessee to the lender. Hence the element of voluntariness is missing in the conduct of parties.

- 4.8 In view of the above, we are of the opinion that the amount was in the nature of loan/advances only. Merely by mentioning in the ledger account, it was "Inter Corporate Deposit", the nature and colour of transaction would not be changed to "Inter Corporate Deposit", as it continues to be loan/advances. Hence required to be taxed for the purposes of deemed dividend. We may rely upon the Jurisdictional High Court in the *Durga Prasad Mandelia v. Registrar of Companies* [1987] 61 Comp. Cas. 479 (Bom.), has noticed the distinction between deposits and loans in the context of section 370 of the Companies Act.

The Court held as under :

*"There can be no controversy that in a transaction of a deposit of money or a loan, a relationship of a debtor and creditor must come into existence. The terms "deposit" and "loan" may not be mutually exclusive, but nonetheless in each case what must be **considered is the intention of the parties and the circumstances**. In the present case, barring the assertion of the respondent that the moneys advanced by the company to the Associated Cement Companies Ltd. constitute a loan and offend section 370 of the Companies Act, there is nothing else to show that these moneys have been advanced as a "loan". In the context of the statutory provisions, the word "loan" may be used in the sense of a "loan" not amounting to a deposit. The word "loan" in section 370 must now be construed as dealing with loans not amounting to deposits, because, otherwise, if deposit of moneys with corporate bodies were to be treated as loans, then deposits with scheduled banks would also fall within the ambit of section 370 of the Companies Act. Therefore, moneys given by the company to the other bodies corporate is a loan within the meaning of section 370 of the Companies Act must be negated. Therefore, the petitioners would well be entitled to the relief."*

- 4.9 Further we may also rely upon the coordinate Bench decision in the matter of **KIIC Investment Company [2019] 101 taxmann.com 19**

(Mumbai - Trib.) , wherein the Bench had allowed the claim, as the intention can be gathered from the agreement, board resolution and other circumstances. However in the present case nothing is available to infer the intention of parties to give ICD. Thus, Ground Nos. 2 to 4 raised in appeal by the Revenue are required to be allowed and we order accordingly. Thus, **Grounds No. 2 to 4 raised in appeal by the Revenue are allowed.**

5. With regard to **Grounds No.5 to 7**, the Ld. DR has drawn our attention to the order of Assessing Officer wherein, the Assessing Officer vide Para 9 & 10 has concluded to the following effect:

“9. The assessee's contention regarding deletion of sub contract income and payments towards investment in the flat at Surat is not acceptable, for following reasons –

- a) During the scrutiny assessment, the Assessee has tried only to give different colour to his earlier statement on oath.*
- b) The assessee is contradicting its own statement, however, without any concrete evidence the same cannot be accepted.*
- c) The point No.5 & 6 are extracted as below-*

Q. 5 During the course of survey proceedings the loose paper vide bundle No. 1 have been impounded, The said bundle is being shown to you. Kindly acknowledge the same and your attention is invited to the page No.3 of the said bundle which bears the date 12.3.2010. Please provide the details of entry made therein and the nature of transaction reflected in your books of accounts?

Ans. I confirm having seen the above said document, which forms the part of bundle No.7. The names appearing in the said list are my sub call tractors and the figures mentioned against each of the names pertains to the payment made during the FY 2009-10.

Q.6 Please elaborate as to nature of the contact given to the persons appearing on the aforesaid. Your attention is also drawn to the bundle No.2 impounded during the course of survey which is a green file leveled as "AC Sub contractor Dank Statement file". As you can see that the file contains banks account extracts and income tax records of one

Shri Mahendra Devkate. Please elaborate as to how, you are in the possession a/these records and what is your relation with these said individual ;.

Ans. I confirm having seen the above said document, which forms the part of bundle No.2. The three individuals mentioned above are my sub contractors and my company i.e. DCPL awards labour contracts to the above individuals. However, I am not aware of these records.

The assessee was confronted about the above facts on the basis of evidences impounded from the survey premises.

d) The point No. 7 is extracted as below-

“Q. 7 I am showing you the statement of Shri Mahendra Devkate recorded on oath U/s 131 of the IT Act, 1961 during the course of Survey proceedings. Shri Devkate has stated that there has been no written order made by your company to him as a sub contractor and that he has been receiving only oral communication tcepserni of the labour work executed by him at our company sites. He has further stated that neither he has any proof of the completion of said work nor has he received of any work completion certificate. In view of the said statement on oath you are hereby requested to clarify as to why it should not be presumed that the sub contract are actually not being executed hut the payments are being made after proper documentation and considering the facts that these are your long trusted employees, the amounts credited into their accounts are ultimately given hack to you in cash after withdrawal rieht morf accounts. Also the presence of extract of bank accounts, IT returns etc in your premises clearly shows the extent of control exercised over your 'employees sub contractors thereby creating the doubts that no work was executed and the money was paid and routed back to the company in cash.

Ans. I have gone through the statement of Shri Mahendra Devkate and the facts brought out by you in respect of the extract of the bank accounts and IT returns of Shri Devkate, Shri Prasad and Shri Pradeep nrakluKi. It is wrong to state that no work was executed by these sub contractors. Although all the proof of work done must be available at the site office and the genuineness call be proved. However, to buy peace of mind "voluntarily declare the stnemyapto each of these individuals in the respective Financial years i.e. 09-10, 10-11 and 11-12 relevant to AY 2010-11, 2011-12 and 2012-13 respectively given as under:

Sr. No	Name	FY 2011-12	FY 2010-11	FY 2009-10	Total	Paid
1	Prasad Kulkarni	5,573,007	4,747,438	3,037,869	13,358,314	4,346,392
2	Pradeep Kulkarni	5,557,959	3,003,657	-	8,591,616	7,084,914
3	Mohendra Devkate	5,598,282	2,610,531	3,382,768	11,591,581	6,763,263
	Total	16,729,248	10,391,626	6,420,637	33,541,511	

Thus, I hereby declare the amounts mentioned each financial year in the table above relevant to the subsequent assessment years as additional income of Dhariya Construction Pvt Ltd. shall be filing the revised returns of each year and incorporate the afore mentioned income and pay the due taxes along with interest thereon.

The assessee was thus, confronted about the above facts on the basis of evidences impounded from the survey premises and shown to him during the statement recording. The impounded materials and the statement of Shri Deokate a subcontractor is also on record.

e) The facts regarding investment in flat is elaborated in point No.8, as under:

"Q.8: Please refer to the bundle NO.3 which is a Mahavir folder pertaining to ENN ENN Corporation Ltd. Your attention is invited to the page NO.9 of the said bundle and page 5 of the said bundle. Pl. explain the entries made at page 9 specially in respect of entry cash Rs. 2,53,59,490/-.

Ans. I confirm having seen the above said document which forms the part of bund No.3. The entries made at page No.9 is related to purchase of a flat No. 302 of B Building in Four Season at Surat. The said property was originally booked by Shri Anup Namdeo Dultani and Mrs. Bharti Dultani. I have purchased the said property at an amount agreed at Rs. 3,64,59,990/- out of which an amount of Rs. 1,06,00,500/- was given through cheque. Again Rs.5,00,000 was also paid through cheque to Anup Dultani. The balance amount of Rs. 2,53,59,490/- was paid against the cost of property by way of cash, which I am offering as additional income for the FY 2011-12 in the hands of Dhariya Construction Pvt. Ltd."

The assessee was thus, confronted about the above facts on the basis of evidences impounded from the survey premises and shown to him during the statement recording. The assessee it self has stated that a cash payment was done for the transaction which is nothing but proved as unexplained income and therefore, the assessee has declared it as undisclosed income.

f) The assessee has not submitted any evidences before the undersigned regarding its claim.

g) the assessee has neither requested nor challenged for the deletion of the said amounts as included by it in the revised return for AY 2011-12.

10. The assessee has thus failed to furnish any explanation substantiating the circumstances and reasons leading to such statement given earlier. Further, it has offered no comments regarding impounded materials on the basis of which it has been confronted for the declaration. Assessee has not stated with evidences anything about the statement of Shri Mahendra Deokate who according to him is a sub contractor. However, Shri Deokate has stated that he has been receiving only oral communication in respect of the labour work executed by him at our company sites. He has further state that neither he has any proof of the completion of said work nor has he received of any work completion certificate. He has nothing to say about the statement of Shri Deokate regarding the presence of extract of bank accounts, IT returns etc in your

premises clearly shows the extent of control exercised over your employees/sub contractors thereby creating the doubts that no work was executed and the money was pad and routed back to the company in cash. It has been established in the survey action that the assessee has suppressed the sales. Accordingly, the amount added back as an additional income in the revised return filed by the assessee is accepted. This also made it clear that but for the survey action u/s.133A of the IT Act, 1961, the said income would have gone undetected and would have caused loss to the revenue. As the assessee has furnished the inaccurate particulars of income in the original return i.e. declaration of income before the survey action, the penalty proceedings u/s.271(1)(c) of the IT Act, 1961 is initiated separately.”

5.1. The Ld. CIT(Appeals) has considered the submissions of the assessee and granted relief to the assessee by telescoping effect. The Ld. CIT(Appeals) has discussed this issue vide Para 9 to the following effect:

“9. I have carefully considered the facts of the case as well as reply of the appellant. In this case it is seen that amount of Rs.2,53,59,490/- was offered as additional income vide answer to question No.8 of the statement of Shri Mukund Dhariya recorded u/s 133A of the Income Tax Act, 1961 on 10/10/2012. The Assessing Officer has reproduced the same on page 9 of the assessment order. However, for ready ref; the same is reproduced here again:

"Q.8: Please refer to the bundle NO.3 which is a Mahavir folder pertaining to ENN ENN Corporation Ltd. Your attention is invited to the page NO.9 of the said bundle and page 5 of the said bundle. Pl. explain the entries made at page 9 specially in respect of entry cash Rs. 2,53,59,490/-.

Ans. I confirm having seen the above said document which forms the part of bund No.3. The entries mace at page NO.9 is related to purchase of a flat No. 302 of B Building in Four Season at Surat. The said property was originally booked by Shri Anup Namdeo Dultani and Mrs. Bharti Dultani. I have purchased the said property at an amount agreed at Rs. 3,64,59,990/- out of which an amount of Rs. 1,06,00,500/- was given through cheque. Again Rs.5,00,000 was also paid through cheque to Anup Dultani. The balance amount of Rs. 2,53,59,490/- was paid against the cost of property by way of cash, which I am offering as additional income for the FY 2011-12 in the hands of Dhariya Construction Pvt. Ltd."

The appellant claims that following amount of income was available which can be considered for telescoping:

<i>Asstt Year</i>	<i>Rupees</i>
<i>2010-11</i>	<i>64,20,637/-</i>
<i>2011-12</i>	<i>1,03,91,626/-</i>
<i>2012-13</i>	<i><u>1,67,29,248/-</u></i>

Total 3,35,41,511/-

It is also seen that there is no finding that the above amount has been spent in any other activity. This being so, the claim of the appellant for-the benefit of telescoping in respect of investment in Surat flat amounting to Rs.2,53,59,490/- is logical. The appellant should have exercised due diligence in this regard while filing revised Return of income. However, failure to do so cannot be held against the appellant as long as the claim appears to be logical and based on facts. Accordingly, on the facts and circumstances of the case, it is held that the appellant's claim for exclusion of amount of Rs.2,53,59,490/- on account of telescopic benefit is acceptable and accordingly the Assessing Officer is directed to allow the same. Before parting with the issue, it is also important to mention that this telescopic benefit has been allowed considering the fact of withdrawal of appeal for A.Y.2010-11, 2011-12 and withdrawal of ground No.3 in the present appeal in respect of additional income on account of bogus sub-contract work. in case the appellant decides to pursue the issue in further- appeal benefit of telescoping will be automatically treated as withdrawn and the Assessing Officer will be entitled to take action in this regard by including the amount of Rs.2,53,59,490/- in the computation of income. Subject to above remark, ground No.4 is allowed.”

- 5.2 The Ld. DR further submitted that statement of assessee was also recorded during the course of survey conducted by the Revenue and in the survey, the assessee had acknowledged the payment of an amount of Rs.2,53,59,490/- in cash for the purpose of purchasing flat in the name of Director. Besides that the assessee has also declared various amounts which has been received by the assessee company from M/s. Dhariya Infrastructure Development Pvt. Ltd.
- 5.3 It was also submitted by the Ld. DR that the Ld. CIT(Appeals) has glossed the fact that the amount declared by the assessee for A.Y.2010-11, 2011-12 and 2012-13 amounting to Rs.64,20,637/-, Rs.10,391,626/-, and Rs.16,729,248/- were not shown in the income of the assessee. (Para 8 of the CIT(A)'s order). However, after accepting the said amount as income for the periods it was declared by the

assessee , the assessee has not pressed these grounds before CIT(A) however he had requested for telescoping of these amounts . The Ld. CIT(Appeals) has granted benefit of telescoping for purchasing flat in cash in the name of Director of the company amounting to Rs.2,53,59,490/-.

5.4 It was also submitted by the Ld. DR that firstly the assessee had accepted the net amount as mentioned including the amount of Rs.2,53,59,490/- in the statement recorded during the course of survey of which taxes were duly paid by the assessee by filing revised return of income. Secondly, it was submitted that the telescoping for the assessment year i.e. A.Y.2012-13 can at all be considered where the assessee filed revised return of income including additional income of Rs.4,20,88,738/- for A.Y.2012-13 which is the assessment year under consideration. Once the Ld. CIT(Appeals) has accepted various amounts declared by the assessee for three assessment years then the telescoping benefit cannot be allowed for the amount of Rs.2,53,59,490/-.

6. On the other hand, the Ld. AR of the assessee had submitted that amount which was declared by the assessee for assessment years 2010-11, 2011-12 and 2012-13 was amounting to Rs.3,35,41,511/- which were accumulated and the said amount was used by the assessee for making cash payment for purchasing flat in Surat in the name of Director of the company, the ld CIT(A) was right in granting the telescoping of the income declared and accepted by the assessee in earlier years. It was also submitted by the Ld. AR

of the assessee that the order passed by the Ld. CIT(Appeals) was in accordance with law.

7. We have heard the rival contentions and perusal the material available on record. Establishing the point on which the Ld. CIT(Appeals) has granted relief to the assessee was that the amount of Rs.3,35,41,511/- which was declared as income from sub -Contract work for assessment years 2010-11, 2011-12 and 2012-13 was utilized by the assessee for the investment with the Flat at Surat being unexplained investment. As a matter of fact, statement of the assessee was recorded during the course of survey and the Managing Director of the assessee company had submitted that the assessee has earned an income for assessment year 2010-11 of Rs.64,20,637/-, for assessment year 2011-12 of Rs.1,03,91,626/- and also for assessment year 2012-13 of Rs.1,67,29,248/- as income from contract work which were not disclosed in the financial statement of the assessee. The answers given by the assessee in Question No.7 and 8 was reproduced by the Assessing Officer at Page 8 and 9 to the following effect:

“Q. 7 I am showing you the statement of Shri Mahendra Devkate recorded on oath U/s 131 of the IT Act, 1961 during the course of Survey proceedings. Shri Devkate has stated that there has been no written order made by your company to him as a sub contractor and that he has been receiving only oral communication tcepserni of the labour work executed by him at our company sites. He has further stated that neither he has any proof of the completion of said work nor has he received of any work completion certificate. In view of the said statement on oath you are hereby requested to clarify as to why it should not be presumed that the sub contract are actually not being executed hut the payments are being made after proper documentation and considering the facts that these are your long trusted employees, the amounts credited into their accounts are ultimately given hack to you in cash after withdrawal rieht morf accounts. Also the presence of extract of bank accounts, IT returns etc in your premises clearly shows the extent of control exercised over your 'employees sub contractors thereby

creating the doubts that no work was executed and the money was paid and routed back to the company in cash.

Ans. I have gone through the statement of Shri Mahendra Devkate and the facts brought out by you in respect of the extract of the bank accounts and IT returns of Shri Devkate, Shri Prasad and Shri Pradeep nrakluKi. It is wrong to state that no work was executed by these sub contractors. Although all the proof of work done must be available at the site office and the genuineness call be proved. However, to buy peace of mind "voluntarily declare the stnemyapto each of these individuals in the respective Financial years i.e. 09-10, 10-11 and 11-12 relevant to AY 2010-11, 2011-12 and 2012-13 respectively given as under:

Sr. No	Name	FY 2011-12	FY 2010-11	FY 2009-10	Total	Paid
1	Prasad Kulkarni	5,573,007	4,747,438	3,037,869	13,358,314	4,346,392
2	Pradeep Kulkarni	5,557,959	3,003,657	-	8,591,616	7,084,914
3	Mohendra Devkate	5,598,282	2,610,531	3,382,768	11,591,581	6,763,263
	Total	16,729,248	10,391,626	6,420,637	33,541,511	

Thus, I hereby declare the amounts mentioned each financial year ni the table above relevant to the subsequent assessment years as additional income of Dhariya Construction Pvt Ltd. shall be filing the revised returns of each years and incorporate the afore mentioned income and pay the due taxes along with interest thereon.

Q.8: Please refer to the bundle NO.3 which is a Mahavir folder pertaining to ENN ENN Corporation Ltd. Your attention is invited to the page NO.9 of the said bundle and page 5 of the said bundle. PI. explain the entries made at page 9 specially in respect of entry cash Rs. 2,53,59,490/-.

Ans. I confirm having seen the above said document which forms the part of bund No.3. The entries mace at page NO.9 is related to purchase of a flat No. 302 of B Building in Four Season at Surat. The said property was originally booked by Shri Anup Namdeo Dultani and Mrs. Bharti Dultani. I have purchased the said property at an amount agreed at Rs. 3,64,59,990/- out of which an amount of Rs.1,06,00,500/- was given through cheque. Again Rs.5,00,000 was also paid through cheque to Anup Dultani. The balance amount of Rs.2,53,59,490/- was paid against the cost of property by way of cash, which I am offering as additional income for the FY 2011-12 in the hands of Dhariya Construction Pvt. Ltd."

7.1 From perusal of the above, it is evidently clear that the assessee declared the income of Rs.3,35,41,511/- as income in the payment made to Prasad Kulkarni, Pradeep Kulkarni and Mahendra Devkate. Once the

assessee declared the income, the element of expenditure, if any, has also taken care of by the assessee while doing so. Similarly in reply to Question No.8, the assessee has also acknowledged that the amount of Rs.2,53,59,490/- was paid in cash besides making all other amount in cheque for purchasing of flat and building in four Seasons, Surat.

7.2 We see there is inherent contradiction in the case of the Revenue. Firstly, if the amount invested by the Director of the Company of Rs.2,53,59,490/- for purchasing of flat is held to be unexplained cash investment then it cannot be taxed in the hands of the assessee company because flat was purchased in the name of Director of the company and amount was invested by the Director. Now the question arises whether the amount spent by the Director in cash for purchasing flat in his own name can be added in the hands of Assessee Company. The answer to this question is "No". As the amount was used by the Director and the said amount was invested individually.

7.3. It is not the case that the said amount of Rs.2,53,59,490/- was generated as unexplained cash by the assessee company over and above the amount declared by the assessee company for assessment year 2010-11 of Rs.64,20,637/-, for assessment year 2011-12 of Rs.1,03,91,626/- and also for assessment year 2012-13 of Rs.1,67,29,248/- as income from sub-contract work and thereafter, invested by the assessee company for purchasing the flat in the name of the company. In fact the case of the revenue could be the money so generated was invested in buying flat in Surat by making the payment in cash.

7.4. The concept of telescoping was discussed by the Hon'ble Madras High Court in the matter of **CIT Vs. K.S.M. Guruswamy Nadar & Sons, 149 ITR 127** and also by the Allahabad High Court in the matter of **Commissioner Of Income-Tax. Vs. Singhal Industrial Corporation, 303 ITR 225**. Both the Hon'ble High Court unanimously held “ *where there is an addition on account of suppression of profit and there is also bogus cash credit in the books, the assessee can seek adjustment of suppression of profit against cash credit on the ground that suppressed profits during the year has been brought in as cash credits.*” . Besides the above, the salient features of telescoping are as follows:

- The source of deposit, year of cash inflow as explained and gross profit addition.
- Investment in later year as explained by intangible addition of earlier years unless it is proved by the Revenue that such additions are not applicable for addition in subsequent year.
- However, this is not applicable if the assessee disputes the addition made in the earlier year and sought to take benefit of telescoping in the year under appeal.
- Further telescoping is not applicable where undisclosed income in the earlier year are not assessed and taxed.

7.5. If we look into the above said proposition of law laid down by the Hon'ble High Courts, it is clear that in the present case the assessee had agreed for the addition of undisclosed income for the earlier years of Rs.64,20,637/-, Rs.1,03,91,626/- and Rs.1,67,29,248/- (for the assessment year under appeal) and has sought for telescoping for the amount of Rs.2,53,59,490/-. In our view, telescoping is permissible to be granted to the

assessee as the flat was purchased in the name of the Director. However the ownership of the asset(flat) belonged to the individual not the assessee company. In view of above, needful is required to be done by the assessee by brining the ownership of the property back to the assessee in the balance sheet to the proportion of contribution made by the assessee company in purchasing flat. In the light of above, **Grounds No.5 to 7 raised in appeal by the Revenue are dismissed subject to the above said observation.**

8. In the result, **appeal of the Revenue is partly allowed.**

Order pronounced on 11th day of February, 2020.

Sd/-
D. KARUNAKARA RAO
ACCOUNTANT MEMBER

Sd/-
LALIET KUMAR
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 11th February, 2020.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	10.02.2020	Sr.PS/PS
2	Draft placed before author	11.02.2020	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		

