

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

ITA No. 3919/Mum/2018
(Assessment Year: 2013-14)

Smt. Irene Edwyn D'mello 36/1, Sadanand CHS Ltd. Tilak Nagar, Chembur, Mumbai-400 089	Vs.	Income Tax Officer 14(2)(3) Room No. 457, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. ABZPD 4177 F		
(Appellant)	:	(Respondent)
Appellant by	:	Shri Pramod Kumar Parida
Respondent by	:	Shri Uodal Raj Singh
Date of Hearing	:	07.10.2020
Date of Pronouncement	:	11.12.2020

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-25, Mumbai ('Id.CIT(A) for short) dated 13.04.2018 and pertains to the assessment year (A.Y.) 2013-14.

2. The grounds of appeal read as under:

1. Addition of business interest income u/s. 56 as against declared u/s. 28 and not allowing netting off of interest- Rs.60,51,743/-

(i) The Id. CIT(A) erred in not treating the interest earned, on fixed deposit out of business funds kept as security/margin money for availing O/D facility, as business income u/s. 28 with failure to appreciate the business nexus vis-a-vis utilization of business funds and further erred in not allowing the netting-off of interest which had all the elements of mutuality towards the common business; therefore, the addition of interest u/s. 56 is uncalled for and the same may resultantly be treated as income u/s. 28 and netting-off may consequently be allowed.

(ii) Without prejudice to the above, maintaining F/D which was purely out of business funds for being a mandatory requirement to avail O/D facility was neither out of surplus funds nor idle funds nor any non-business fund but only out of business exigency;

therefore, the action for addition u/s. 56 lacks merits and the order impugned may be vacated.

(iii) Without further prejudice to the above, mere book entry is not enough to determine the character of income or the applicability of section as earning of bank interest was not the motive, the interest credit may therefore, be treated as business income and netting off may be allowed to keeping in view to the consistency approach.

Addition on account of alleged unexplained O/D credit balance pending adjustment- Rs.15,00,000/-

(i) The Id. CIT(A) erred in confirming the addition of unadjusted opening credit balance as allegedly unexplained and liable to be taxed as deemed income without appreciating that when in earlier years, the same credit balance had been accepted by the Assessing Officer, no addition of same could be added unjustly in the subsequent year; hence, the addition may be deleted as on merits, as it is not a case u/s. 68 nor under any other section.

(ii) The Id. CIT(A) failed to appreciate that the amount received, from Mr. Amit Ruparel to meet pending electricity expenses of tenants, was pending for future adjustment; hence no addition is called for in the hands of the Appellant and the same may be deleted.

(iii) Without prejudice to the above, as the statement, if any, recorded was not confronted with the appellant, the addition made may be deleted.

3. Levy of Penal Interests

The Appellant, on merits, denies her liability to penal interest.

Apropos the issue of treatment of interest received as income from other sources.

3. Brief facts of the issue are as under:

During the course of assessment proceedings, it was seen by the A.O. that the assessee had received interest on FD at Rs.60,51,743/-. The closing WIP shown by the assessee was at Rs.13,65,05,000/- after claiming expenditure under various heads. It was also seen by the A.O. from the statement of total income of the assessee that the interest on FD had not been offered to tax under the head 'Income from other Sources'. The assessee was asked by the A.O. vide a letter dated 09.07.2015 to explain as to why the interest received on FD should not be taxed under the head 'Income from other sources'. In response to the A.O.'s show cause letter dated 09.07.2015, the AR of the assessee vide letter dated 12.08.2015 submitted before the A.O. that against the mortgage of FD, she had availed credit facility from OD A/c which has been utilized for business. The

submission of the assessee was considered by the A.O. but it was not accepted for the following reasons:

(1) the assessee had taken loan of Rs.6,16,32,354/- from OD A/c. with Bharat Co-operative Bank and also made investment in FD with the same bank at Rs.6,26,07,051/-. The assessee has received total advances from customers at Rs.17,75,30,806/- and her WIP is only to the extent of Rs.13,65,05,000/-. The assessee was having excess fund of Rs.4,10,25,806/- at her disposal and coupled with the money received on TDR at Rs.99,00,904/-, the excess fund at assessee's disposal was to the tune Rs.5,09,26,710/-.

(ii) no interest had been charged on advances made of Rs.5,60,15,926/-.

The above facts were brought to the notice of the assessee by the A.O. vide letter dated 05.01.2016 that the interest on FD was proposed to be taxed under the head Income from other sources. In response to the above, the AR made a written submission vide his letter dated 11.03.2016 before the A.O. The submission of the assessee before the A.O. reads as under:

“We would like to state in continuation with our letter dt. 22.01.2016 ft 03/02/2016 that we have invested in business surplus funds its Fixed Deposits and also availed the OVERDRAFT in earlier years. Further in requirement of Funds for the operation of business we had availed loan after pledging the said FD for which we have to pay 2% extra interst to the Banker after netting off the FD Interest Received. The funds availed from OVERDRAFT was used exclusively for the purpose of business only since the capital credit balance of Proprietor as of 31.03.2013 was Rs.67,28,676/-. This clarifies that the funds were not diverted out of the business, therefore, the net interes charged on OVERDRAFT ACCOUNT in excess INTEREST EARNED ON F.D. to be considered instead of GROSS So interst on said FD should be considered as bUsiness Income only and Bank OD Interest should be allowed as Business Expenditure. Therefore, by any stretch of imagination the said FD Interest cannot be taxed as income from other sources. Therefore, FIXED DEPOSIT CANNOT BE READ IN ISOLATION BUT THE SAME SHOULD TO READ WITH THE OVERDRAFT, SINCE IT IS PLEDGE WITH BANK. Since the fixed deposit was business asset and the interest earned and paid to the bank is business transactions only so the same should be allowed as business income and overdraft interest paid to bank as bsiness expenses as claimed in the financial statements. Furtehhr, if you are opting to tax under the head INCOME FROM OTHER SOURCES then the OVERDRAFT INTERST PAID TO BANKERS SHOULD BE ALLOWED U/S. 57, since for earning the deposit interest out client had paid OVERDRAFT INTEREST.....”

4. However the assessing officer was not satisfied. He rejected the above contention by holding that the F.D. was done out of surplus funds and hence it was to be taxed as income from other sources. Learned CIT appeals also confirmed the same.

5. Against the above order, the assessee has filed appeal before us.

6. We have heard both the parties and perused the records. We find that the fixed deposit was done in the earlier years and on the pledge of the same assessee has obtained loans for the purpose of business and the same was utilised for the purpose of business. These facts have not been disputed by the authorities below. However on the premise that the fixed deposit was done out of surplus funds available at that time which was much earlier than the present assessment year the authorities below have treated the interest as income from other sources this year. The said fixed deposit was pledged for obtaining loan for the purpose of the business. It is common knowledge that loan obtained on the pledge of fixed deposit for the purpose of business, the rate of interest charged by the bank slightly higher than the interest being paid on the fixed deposit. Why this aspect is not accepted by the authorities is not understood. The assessee has duly explained that by way of pledging the F.D.'s over draft for the purpose of business was obtained at the rate of interest 2% higher than F.D. rate. What more explanation is required for netting the interest expenditure is also beyond comprehension. If as per the opinion of the authorities below which itself is in fact sitting in the shoes of the businessman, the assessee should have broken the fixed deposit assessee would have been penalized for the premature realisation of interest. The fact that the rate of interest charged upon the pledge of fixed deposit is linked to the rate of interest accruing on the fixed deposit has been totally

ignored by the authorities below. Moreover the fact that this interest was being treated as income from business in the earlier years has been ignored by the authorities below. It is settled law that de'horse change in facts or law, the view taken in the earlier years should not be disturbed. This view was expounded by the honourable Supreme Court in the case of Radha Swami Satsang and reiterated in the case of Excel Industries. Hence, in our considered opinion the view of the authorities below to treat the said interest as income from other sources is not sustainable. Accordingly, we set aside the orders of authorities below and decide the issue in favour of assessee.

Apropos the issue of treatment of loan of 15 lac

7. Brief facts on this issue are as under:

During the course of assessment proceedings, it was seen by the A.O. from the balance sheet of the assessee for the year under consideration that the assessee had shown loan of Rs.15,00,000/- from Shri Amit Ruparel. During the course of assessment proceedings, a notice u/s.133(6) dated 16.2.2016 was issued to the said party asking for confirmation of transaction. In response to notice u/s. 133(6), Shri Amit Ruparel submitted his reply before the A.O. on 04.03.2016 and that the amount of Rs.15,00,000/- has been paid to the assessee for acquiring her share in the firm. In view of the above the assessee was asked by the A.O. to explain as to why the same should not be treated as assessee's income and added to the total income. In response to the above mentioned show cause letter of the A.O., the AR of the assessee made written submission before A.O. vide letter dated 11.3.2016. The AR of the assessee submitted that an amount of Rs.15 lacs were received from Shri Amit Ruparel as advances towards her retirement

from the firm. It has been further submitted that the retirement from the firm was much later and the settlement amount to be received are pending. The A.O. considered the submissions of the assessee carefully and held that the amount of Rs.15,00,000/- had been shown as loan from the Shri Amit Ruparel and then it was stated by the assessee that the amount received was advances towards retirement from the firm. The said amount of Rs.15,00,000/- had been credited in assessee's bank account with Bharat Co.op. Bank on 04.09.2012. the A.O. has observed that as far as assessee's submission that settlement amount to be received was still pending, it may be mentioned that the said amount of Rs.15 lacs had been paid for acquiring assessee's share in the firm and not towards settlement of the project. The A.O. concluded that the said amount of Rs.15 lacs had been received by the assessee as compensation for retiring from the firm and not as loan as claimed by the assessee in her Balance Sheet. Therefore, the A.O. concluded that the same was to be taxed in the hands of the assessee under the head 'income from other sources.' Accordingly, the A.O. added the said amount of Rs.15,00,000/- to the income of the assessee, treating the same as 'Income from other sources'.

8. Upon the assessee's appeal, the learned CIT appeals confirmed the same by observing as under:

5.2.3 I have considered the facts of the case, the assessment order passed by the A.O., the submissions made by the AR of the appellant. It is seen from the A.O.'s order and assessee's aforesaid submissions that the assessee has failed to establish that the amount of Rs.15 lakhs shown as loan from Mr. Amit Ruparel was indeed a loan. In fact, it is found to be consideration received by the assessee from Mr. Amit Ruparel for acquiring assessee's share in the firm and therefore, it constitutes income in the hands of the assessee. In this view of the matter, I see no reason to take a view in the matter different from the one taken by the A.O. The action of the A.O. in disallowing the loan amount of Rs.15,00,000/- is sustained.

9. Against the above order, the assessee is in appeal before us.

10. We have heard both the parties and perused the records. We find that divergent facts on the above issues are arising from the orders of the authorities below and the grounds of appeal taken by the assessee. The assessee submits that it was a loan taken in the earlier year. Assessee has submitted before the assessing officer that it was received from Shri Amit Ruparel as consideration of retirement from partnership firm. The assessee then changes the stand and submitted that the settlement of partnership dues has not been finalised. Then in the grounds of appeal it is urged that the said amount has been taken as loan for payment of electricity bill et cetera. The authorities below have also erred in treating the same as income from other sources ignoring the fact that the said loan was not taken this year.

11. In our considered opinion, in view of the divergent stand of the assessee we deem it appropriate to remit the issue to the file of assessing officer. Assessing officer should consider the issue *de novo* after making appropriate enquiries. The assessing officer is also directed to consider the issue under the sanguine provisions of law which he proposes to invoke. Accordingly, this issue stands remitted to the file of assessing officer. Needless to add assessee should be granted adequate opportunity of being heard.

12. In the result, this appeal by the assessee stands partly allowed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board on 11.12.2020.

Sd/-
(Ravish Sood)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 11.12.2020
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai