

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE "A" BENCH : PUNE
BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
ITA.No.1937/PUN./2017
Assessment Year 2010-2011

The DCIT, Circle-1(2), PMT Bldg., Swargate, Shankarshet Road, Pune - 411 037.	vs.,	Dhariya Construction Pvt. Ltd., Plot No.43, Indu Niwas, Shivaji Housing Society, Shivaji Nagar, Pune - 411 016. PAN AAECA9056B
(Appellant)		(Respondent)

For Revenue :	CA Abhay Avachat
For Assessee :	Shri Ramnath P Murkude

Date of Hearing :	23.05.2023
Date of Pronouncement :	23.05.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

This Revenue's appeal for assessment year 2010-2011, arises against the learned CIT(A)-1, Pune's appeal No.PN/CIT(A)1/DCIT Cir.1(2)/PN/293/15-16, dated 24.05.2017, involving proceedings u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. The Revenue raises the following substantive grounds in the instant appeal :

1. *“The order of the Ld. CIT(A) is contrary to law and on facts and in the circumstances of the case*
2. *The Ld. CIT (A) grossly erred in deleting the addition made by the A.O. u/s 2(22)(e) of the I.T. Act, 1961 of Rs.1,07,62,848/- instead of confirming the said addition as the assessee tried to colour the loan/ advances by giving name of inter corporate deposits.*
3. *The Ld. CIT (A) grossly erred in interpreting section 2(22)(e) of the I.T. Act as the basic conditions for treating the transaction as deposit are not satisfied.*
4. *The Ld. CIT (A) erred in ignoring various facts and its analysis put-forth by the A.O. in his assessment order which clearly establishes that transaction of Rs.1,07,62,848/- is in nature of loans/ advances and not in nature of Inter Corporate deposit.*
5. *The Ld. CIT (A) 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.*
6. *The Ld. CIT(A) erred in not relying in the decision of A.N. Shamsudeen V. Union of India and others (2000) 244 ITR 266 the Madras High Court and decision of Durga Prasad Mandella V. Registrar of Companies [1987] 61 Comp. Cas.*

479 (Bom) of Bombay High Court being jurisdictional High Court.

7. For these and such other grounds as may be urged at the time of hearing, the order of the Ld. CIT(A) may be vacated and that of the AO may be restored.

8. The appellant craves to add, amend,- alter or delete any of the above ground of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”

3. It thus emerges from perusal of the Revenue's pleadings that it's sole substantive grievance raised in the instant appeal challenges correctness of the CIT(A)'s action reversing the assessment findings making sec.2(22)(e) deemed dividend addition of Rs.1,07,62,848/-. The assessee's stand throughout is that the impugned sum represents inter-corporate deposits bearing interest than loans/advances covered under the deeming fiction of dividends u/s.2(22)(e) of the Act.

4. We have given our thoughtful consideration to the foregoing rival stands and find merit in the Revenue's arguments. This is for the precise reason that this tribunal's learned coordinate bench in ITA.No.1440/PUN./2015 for assessment year 2012-2013 decided on 11.02.2022, has already reversed the CIT(A)'s identical action deleting the

similar addition of deemed dividends representing inter-corporate deposits as under :

“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 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.”

4.1. This tribunal's yet another coordinate bench's order in Revenue's appeal ITA.No.1938/PUN./2017 for assessment year 2011-12 decided on 12.08.2022 has also adopted judicial consistency for accepting the Revenue's very stand as well. Faced with the situation, we hereby adopt the above detailed reasoning *mutantis mutandis* to restore the impugned deemed dividend addition of Rs.1,07,62,848/- made by the Assessing Officer in his assessment dated 19.10.2015. This Revenue's appeal ITA.No.1937/PUN./2017 succeeds in very terms.

5. Learned counsel Mr. Abhay Avachat submitted before parting that the assessee had filed its cross objection CO.No.30/PUN./2022 in assessment year 2011-12 seeking correct computation of the impugned deemed dividend addition which has been restored back to the Assessing Officer on 13.09.2022. The Revenue is equally fair enough at this stage that the Assessing Officer's consequential computation shall indeed verify the necessary factual position of the assessee's correct amount of the impugned addition in very terms. Ordered accordingly.

6. This Revenue's appeal is allowed in above terms.

Order pronounced in the Open Court on 23.05.2023.

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune, Dated 23rd May, 2023

VBP/-

Copy of the Order is forwarded to:

1. The Appellant;
2. The Respondent;
3. The CIT(A)-1, Room No.101, B.O. Bhavan, Sy.No.47,
Flat No.1, Pune-Satara Road, Pune – 411 009.
4. The Pr. CIT-1, Pune
5. The DR 'A', ITAT, Pune
6. Guard File

BY ORDER,

Senior Private Secretary : ITAT Pune Benches :
Pune