

आयकर अपीलीय अधिकरण 'बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

माननीय श्री वी. दुर्गारव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपीलसं./ ITA No.562/Chny/2018
(निर्धारणवर्ष / Assessment Year: 2010-11)

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आयकर अपीलसं./ ITA No.563/Chny/2018
(निर्धारणवर्ष / Assessment Year: 2011-12)

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आयकर अपीलसं./ ITA No.564/Chny/2018
(निर्धारणवर्ष / Assessment Year: 2012-13)

ACIT-Circle-1 Salem.	बनाम/ Vs.	M/s. AVR Swarnamahal Jewellery Pvt. Ltd. No.251-A, Omalur Main Road, Swarnapuri, Salem-636 004.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAHCA-9042-L		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Assessee by	:	Shri T. Banusekar (CA) – Ld. AR
प्रत्यर्थीकी ओरसे/ Revenue by	:	Shri D. Hema Bhupal (JCIT) – Ld. DR

सुनवाईकी तारीख/Date of Hearing	:	28-03-2023
घोषणाकी तारीख /Date of Pronouncement	:	09-06-2023

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by Revenue for Assessment Years (AYs) 2010-11, 2011-12 & 2012-13 arises out of separate orders of learned first appellate authority. The impugned order is common order for AYs

2010-11 & 2011-12 which is passed by learned Commissioner of Income Tax (Appeals), Salem [CIT(A)] on 22-11-2017 in the matter of assessments framed by Ld. Assessing Officer [AO] u/s. 143(3) of the Act on 28-03-2013 & 17-02-2014 for AY 2010-11 and 2011-12 respectively. The impugned order has been passed by same authority on same date in the matter of an assessment framed by Ld. AO u/s 143(3) on 18-03-2015. It is admitted position that facts as well as issues are identical in all the years and adjudication in any one year would have equal application to the other years also. For the purpose of adjudication, facts from AY 2010-11 have been culled out in this order. The grounds raised by the revenue read as under:

- (i) The CIT(A) had failed to consider the fact that the assessee had not provided the basis and methodology adopted for arriving the amortization expenditure with regard to the debenture bonds during the course of assessment proceedings.
- (ii) The CIT(A) ought to have given an opportunity to the Assessing officer as per rule 46A of the Income-tax Act to verify the fresh claim filed before the CIT(A) with regard to the calculation of Amortization expenditure.
- (iii) The CIT(A) failed to consider the Board's Circulars regarding deduction of TDS on debenture bonds. The said circulars are relevant for Public Limited companies with wide participation by public where the payee for each year is not known. Here, the beneficiaries are the family members of promoters and Directors of the company and payee is very well known to the company. Hence, the amortization expenses clearly attract TDS provisions.
- (iv) The CIT(A) failed to consider the fact that the amount of Amortization expenses claimed by the assessee company is not retained in the company's books as provision but the same is clubbed with the sundry creditors account. Hence, TDS provisions are clearly applicable.
- (v) The CIT(A) had failed to consider the fact that in the communication sent by the Board to M/s. Emerald Testing India Private Limited no where it is mentioned that the Board's circulars are applicable to Private Limited companies.

As is evident, the sole substantive issue that arises for our consideration is disallowance of amortization expenditure.

2. The Ld. Sr. DR pleaded for restoration of assessment framed by Ld. AO. The revenue has filed petition under Rule 29 also seeking admission of additional evidences. In this petition, the revenue has filed

additional evidence which is in the shape of TDS returns filed by the assessee for Assessment Year 2013-14. The Ld. AR, on the other hand, supported the impugned orders and made alterative arguments. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged in trading of gold ornaments etc.

Assessment Proceedings

3.1 The impugned issue stem from the fact that the assessee claimed expenditure of Rs.285.18 Lacs as 'Amortization of discount on debentures'. It transpired that the assessee had issued zero-coupon, unsecured, convertible debentures for an issue price of Rs.2000/- per debenture. The debentures were redeemable after 9 years at Rs.6400/- per debenture. The assessee amortized the differential amount of Rs.4400/- over the life period of debentures. The details of debenture subscribers have been tabulated on page no.2 of the assessment order. It could be seen that all the debentures were issued to related parties. Considering the same, Ld. AO proposed to lift the corporate veil and formed an opinion that the issue of debentures had the propensity to postpone the tax liability by artificial mechanism.

3.2 It was also observed by Ld. AO that the business was run by two firm viz. AVR Swaranmahal and Swaranpuri AVR Jewellery. There was search on those firms and its partners on 29.01.2009. Subsequently, the assessee company was floated and certain assets of the two firms were taken over by the company. At that time, the firm revalued its assets by introducing a new asset called goodwill to the tune of Rs.3.75 Crores and by crediting the proceeds to the partners in their

capital account in their profit-sharing ratio. Similarly, windmill division was also revalued and the difference was similarly credited to the partners' capital account. The whole mechanism was done with a view to defeat the provisions of Sec. 45(4). The promoters and his family members floated the assessee company and issued shares to themselves and then floated zero coupon debentures having face value of Rs.6400/- per debenture at a discounted price of Rs.2000/- per debenture which translate into discount rate of 68.75%. The discount was nothing but interest on Rs.2000/- for a period of 9 years to the members of the family. Since the assessee did not deduct TDS against the same, Ld. AO proposed disallowance u/s 40(a)(ia).

3.3 The assessee relied on CBDT Circular No.2 of 2002 dated 15.02.2002 and Circular No.4 of 2004 dated 13.05.2004. The Circular No.2/2002 provides that difference between subscription price and redemption price would be treated as interest income. In case of transfer of bonds before maturity, the difference would be subjected to capital gains tax or assessable as business income, as the case may be. On final redemption, no capital gains will arise. The tax would be deducted at source on difference between the bid price and the redemption price at the time of maturity. The Para-8 of the Circular provides that the difference between the bid price of a deep discount bonds and its redemption price which is actually paid the time of maturity, will continue to be subject to tax deduction at source under Section 193 of the Income Tax Act. The subsequent Circular No.4/2004 dated 13.05.2004 clarified that the tax would be deducted at source u/s 193 or Sec.195, as the case may be, only at the time of redemption of such bonds, irrespective of whether the income from the

bonds have been declared by the bond-holder on accrual basis from year to year or is declared only in the year of redemption. The persons who declared income on annual accrual basis during the term of bond would be entitled to apply for non-deduction / lower deduction u/s 197 of the Act detailing the income offered for tax by him on year to year basis. However, Ld. AO held that the benefit of circulars would be available for public limited companies with large public participation only. Proceeding further, considering high return of 24.45% per annum, the provisions of Sec.40A(2)(b) would also apply since market rate would be around 9.5% to 10% and the balance was excessive and would need to be disallowed. The transaction would also attract the disallowance u/s 40(a)(ia). Finally, the amortization expenses as claimed by the assessee was disallowed u/s 40(a)(ia). In the alternative, Ld. AO proposed disallowance of excess interest of 14.45% u/s 40A(2)(b).

Appellate Proceedings

4.1 The Ld. CIT(A), considering assessee's documentary evidences, held that the issue of debentures could not be considered as colorable device and the disallowance on this ground could not be sustained. The entire transaction was routed through banking channels and entire trail of transaction was furnished by the assessee. The sources of funds as available with the subscribers were also filed. Nothing in law prohibits the private limited company to issue debentures to shareholders and its directors and therefore, issue of debentures to relate party by itself would not create any doubt over the transaction. Once the genuineness of the funds brought into the company was proved and which was for business purposes, AO was not right in

travelling beyond the spirit of the business transaction and law. It was not relevant for AO to look into the compliance procedure under the Companies Act, 1956 and the said legislation is not the governing legislation for the purpose of assessment of income under Income Tax Act. Further the business of the firms was taken over on slump sale basis u/s 50B and therefore the allegation that assessee avoided capital gains u/s 45(4) was not correct. Therefore, the stand of Ld. AO, to that extent, was rejected. The revenue has not challenged the same any further.

4.2 On applicability of provisions of Sec. 40A(2)(b), Ld. CIT(A) tabulated effective amortization rate and held that ultimate consideration in the working would only be the effective rate at which the amortization has been worked and not the actual rate as charged in the individual years as the said charge is subject to change over the life of the debentures and hence, considering individual years rate will not be appropriate. In the decision of Chennai Tribunal in **M/s Venkatanarayana Metals and Realtors Pvt. Ltd. vs. ACIT (ITA No.1101/Mds/2011 dated 01-08-2014)**, the rate of interest for the purpose of computation of amortization of premium of debentures at 13.5% was considered to be acceptable range which is comparable to assessee's rate and therefore, the disallowance u/s 40A(2)(b) was to be deleted.

4.3 On applicability of provisions of Sec.40(a)(ia), Ld. CIT(A) relied on CBDT Circular No.4/2004 dated 13-05-2004 and CBDT communication in the case of M/s Tata Iron and Steel Company Limited (Letter No.275/126/96 IT(B) dated 05.07.1996) and also in the case of M/s Emerald Testing India Private Ltd. (F.No.275/103/2003 – IT(B) dated

30.09.2004) wherein it was reiterated that TDS would not be applicable in the case of amortization of discount on debentures. The extract of the letters have been reproduced in para 9.2 of the impugned order.

Accepting the plea of the assessee, it was held as under: -

9.3. It is noted that the CBDT had considered both circular number 2/2002 and 4/2004 while replying to M/s. Emeralds Testing India Private Limited, which is a Private Limited Company, and confirmed the intention of the legislation that these circulars are applicable even to private limited companies also. Hence, the contention of the AO that these circulars are applicable only to large public limited companies with wide participation by public and where the payee for each year is not known, is not acceptable. Hence, the grounds of appeal of the assessee are allowed.

Aggrieved aforesaid, the revenue is in further appeal before us.

Our findings and Adjudication

5. The factual matrix is not in dispute. The revenue has not challenged the findings rendered qua colorable device as alleged by Ld. AO. The only ground raised against findings rendered for Sec.40A(2)(b) is violation of Rule 46A of the Act. However, we find that the assessee has merely provided computation of amortization of discount amount which are mere alternative computations and not in the shape of additional evidences. Therefore, this plea of the revenue could not be accepted. So far as the applicability of CBDT Circular No.4/2004 is concerned, we are of the considered opinion that the benefit of the same would apply to private limited entity also since M/s Emerald Testing India Private Ltd. is a private limited entity only and Board has clarified that those entities would also be covered under the circular. This fact has also been noted by Ld. CIT(A) as extracted above. Therefore, the grounds raised in this regard stand dismissed. The only issue that remain to the adjudicated is impugned disallowance for want of Tax deduction at source (TDS).

6. In the additional grounds of appeal as filed by of petition under Rule 29, it has been submitted that the amortization expenditure claimed by the assessee from financial years 2009-10 to 2013-14 amounts to Rs.1507.37 Lacs which has been debited in the Profit & Loss Account as interest paid to shareholders. However, in the year of conversion of debentures i.e. financial year 2012-13, the assessee has deducted Tax at source u/s 194A only against the amortization expenditure of Rs.244.44 Lacs claimed for that year and has not deducted TDS against interest claimed in all the earlier years. The assessee has, however, obtained relief in the impugned order by relying upon CBDT Circular No.2 of 2002 and Circular No. 4 of 2004 claiming that the TDS would be deducted in the year of payment. The revenue submits that the TDS return filed by the assessee for AY 2013-14 would be a crucial piece of evidence in deciding the appeal. The Ld. AR submitted that TDS obligation arose in AY 2013-14 and therefore, the provisions of Sec. 40(a)(ia) could not be invoked in the impugned years. The Ld. AR also submitted that the debentures were converted into shares and this transaction would not amount to transfer and hence, recipient would not be liable for any tax. Lastly, Ld. AR sought benefit of second proviso to Sec. 40(a)(ia).

7. After perusal of additional evidence, we find substance in this argument of revenue since the assessee was obligated to follow the stated circulars in letter and spirit but failed to do so. We concur with the submissions that the additional evidence would have material bearing to decide the appeals and therefore, we admit the same and restore the impugned disallowance u/s 40(a)(ia) back to the file of Ld. AO for fresh adjudication in the light of additional evidences filed by the

revenue, keeping all the arguments open as advanced by Ld. AR. The assessee is directed to substantiate its case. Needless to add that adequate opportunity of hearing shall be granted to the assessee.

8. Facts as well as issues are stated to be pari-materia the same in both the other appeals also and therefore, our adjudication as above shall mutatis mutandis apply to these appeals also.

9. All the appeals stand partly allowed for statistical purposes in terms of our above order.

Order pronounced on 9th June, 2023.

Sd/-

(V. DURGA RAO)

न्यायिक सदस्य /JUDICIAL MEMBER

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखासदस्य /ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 09-06-2023
EDN/-

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त/CIT 4. विभागीयप्रतिनिधि/DR 5.

गार्डफाईल/GF