

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'ए', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.427/Kol/2023
Assessment year: 2016-17

Babulal Khetawat.....Appellant
143/1/1, Cotton Street,
Burrabazar, Kolkata-700007.
[PAN: AFCPK7938N]

vs.

ACIT, Circle-43, Kolkata.....Respondent

Appearances by:

Shri Rajiva Kumar, AR, appeared on behalf of the appellant.

Shri Umakanta Dhrupati, DR, appeared on behalf of the Respondent.

Date of concluding the hearing : September 19, 2023

Date of pronouncing the order : November 16, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 06.03.2023 of the National Faceless Appeal Centre (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee in this appeal has taken the following grounds of appeal:

"1. That under the facts and circumstances of the case, the ld. CIT(A) erred in confirming disallowance of interest expenditure of Rs.51,83,279/- made by the A.O in terms of section 57 of the Income Tax Act, 1961. The disallowance is unjustified and needs to be deleted.

2. The assessee craves leave to add, alter, amend or withdraw any ground or grounds of appeal before or at the time of hearing."

3. The sole issue involved in this appeal is relating to the disallowance of the interest expenditure incurred by the assessee for earning of the interest income on deposit made by the assessee in the private limited company in which the assessee was a director.

4. The brief facts of the case are that the Assessing Officer during the assessment proceeding observed that the assessee has raised loans from 10 parties on interest at a interest rate of 9% to 13 % and had advanced the same to its concerns namely Etibar Investments Pvt. Ltd., a company in which the assessee was a director and Shri Shree Durga Oil mills, a partnership firm in which the assessee was a partner. The Assessing Officer observed that the assessee has taken the loan from market at a lesser rate and further advanced to its own concerns at a higher rate. He, therefore, held that the assessee was involved in the money lending business and held that the interest income of the assessee was liable to be taxed as business income. He, however, observed that the expenditure incurred by the assessee in procurement of funds cannot be allowed as a deduction, the same being hit by Explanation 1 to section 37 of the Income Tax Act and section 73 of the Companies Act.

5. Explanation 1 to section 37 of the Income Tax Act reads as under:

“For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.”

The relevant Section 73 of the Companies Act is reproduced as under:

“73. (1) On and after the commencement of this Act, “no company shall invite, accept or renew deposits under this Act from the Public except in a manner provided under this Chapter:”

Provided that nothing in this sub-section shall apply to a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 (2 of 1934) and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in his behalf.

(2) A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfilment of the following conditions”

Exceptions/Modification/Adaptations – In case of Private company-Clause (1) to (e) of sub-section (2) of section 73 shall not apply to private companies which accepts from its members monies not exceeding one hundred per cent, of aggregate of the paid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified – Notification dated 5th June 2015.”

Further, the relevant rule (2C)(viii) of the Companies (Acceptance of Deposits) Rules, 2014 is reproduced as under:

“(2C) “deposit” includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include.

(viii) Any amount received from a person who, at the time of receipt of the amount, was a director of the company or a relative of the director of the Private Company.

Provided that the director of the company or relative of the director of the Private Company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report."

As per the provisions of section 73 of the Act, there was a bar on accepting deposits and further as per Rule (2C)(viii) of the Companies (Acceptance of Deposits) Rules, 2014, though a director of the company was not barred of giving loan or deposits to the company, however, he was supposed to give a declaration that the amount was not being given to the company out of funds acquired by him by borrowing or accepting loans or deposits from others. The Assessing Officer, therefore, invoking the Explanation 1 to section 37(1) of the Act held that since it was prohibited by law for the company to accept the deposits from the director which was borrowed from other persons, therefore, the act on the part of the director to give deposits to the company unlawful. He accordingly disallowed the interest expenditure incurred by the assessee on the deposits received from private parties.

6. In appeal before the CIT(A), the assessee pleaded that the company in which the assessee was director was a private limited company and that it was not barred for a private limited company to accept deposits from its members. It was also submitted before the CIT(A) that even otherwise the default, if any, was on the part of the company and that no disallowance could have been made by the Assessing Officer on the interest expenditure incurred by the assessee on the loans taken from

the private party. However, the ld. CIT(A) did not agree with the contentions raised by the assessee and confirmed the order of the Assessing Officer.

7. We have heard the rival contentions and gone through the record. A perusal of the provisions of section 73 of the Act would show that the section 73 does not absolutely bar any company from accepting deposits. It has been mentioned that “no company shall invite, accept or renew deposits under this Act from the Public except in a manner provided under this Chapter”. Therefore, if a deposit is accepted as provided under the relevant Chapter of the Companies Act, then that was not barred. Further, it has been provided that nothing in the aforesaid sub-section would apply to a banking company and non-banking financial company. Further, as per Notification dated 5th June 2015 issued by the Ministry of Corporate Affairs, in case of private company, clause (1) to (e) of sub-section (2) of section 73 shall not apply to private companies which accepts from its members monies not exceeding one hundred per cent, of aggregate of the paid up share capital and free reserves and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified. There was no evidence brought on record that any action was taken by the competent authority against the said company namely Etibar Investments Pvt. Ltd. It was a debatable issue as to the assessee under the relevant provisions has done any act prohibited by law or not as the competent authority that could decide that issue was under the Companies Act and not under the Income Tax Act and the default, if any, is to be first established against the company, only then the question of any default on the part of the assessee can be considered.

Even otherwise, a very important point which has been brought to our knowledge is that as per the details given by the Assessing Officer, the amount of Rs.5,23,31,058/- was the opening balance of the assessee in respect of deposits to Etibar Investments Pvt. Ltd. as on 01.04.2015 and Rs.2,85,00,000/- was the closing balance as on 31.03.2016. The aforesaid factual details mentioned by the Assessing Officer would show that the deposits by the assessee were given in the earlier years. It is pertinent to mention here that the relevant Rule (2C)(viii) referred to by the Assessing Officer was inserted and notified vide Notification dated 15th September 2015 issued by Ministry of Corporate Affairs. The financial year relevant to the assessment year under consideration is 01.04.2015 to 31.03.2016, therefore, in view of the aforesaid dates and events, there was no bar upon the director to make deposits with the company by taking funds from private parties as on 01.04.2015. The relevant rules have been notified on 30.09.2015. However, the assessee's deposits were lying with the company even prior to 01.04.2015 as the Assessing Officer has taken note of opening balance as on 01.04.2015. In view of the aforesaid legal position, it cannot be said that the assessee while making the deposits with the company was prohibited by law at that time. In view of this, the impugned additions made by the Assessing Officer are not sustainable and the same are ordered to be deleted.

8. In the result, the appeal of the assessee stands allowed.

Kolkata, the 16th November, 2023.

Sd/-
[डॉक्टर मनीष बोर्ड /Dr. Manish Borad]
लेखा सदस्य /Accountant Member

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य /Judicial Member

Dated: 16.11.2023.

RS

Copy of the order forwarded to:

- 1 Babulal Khetawat
2. ACIT, Circle-43, Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches