

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER &
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 1093/Ahd/2019
(निर्धारण वर्ष / Assessment Years : 2010-11)

Dy.CIT Gandhinagar Circle, Gandhinagar	बनाम/ Vs.	Shri Jayantibhai S. Patel 48, Shankar Society, Part- 1, Ahmedabad, Gujarat - 382424
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADGPP8465R		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Atul Pandey, Sr. DR
प्रत्यर्थी की ओर से/Respondent by :	Shri M. K. Patel, AR

Date of Hearing	24/06/2024
Date of Pronouncement	05/07/2024

ORDER

PER SHRI NARENDRA PRASAD SINHA, AM:

The present appeal is filed by the Revenue against the order of the Commissioner of Income Tax (Appeals), Gandhinagar, (in short ‘the CIT(A)’) dated 02.04.2019 for the Assessment Year 2010-11.

2. This appeal is against third round of assessment completed under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) in this case. The brief facts of the case are that the return of income for A.Y.2010-11 was filed by

the assessee on 30.03.2011 declaring total income of Rs.10,45,850/-. The first assessment order was passed u/s 143(3) on 25.01.2013 wherein the addition of Rs.53,442/- was made. Thereafter, the case was reopened under Section 147 of the Act and the re-assessment was completed under Section 143(3) r.w.s. 147 of the Act on 17.03.2016 at total income at Rs.17,50,300/-. The case was once again reopened on 31.03.2017 on the ground that the assessee had obtained loan of Rs.3,08,90,000/- from Shri Rang Infrastructure Pvt. Ltd., a company in which the assessee was a Director. It transpired that the assessee was holding more than 10% shares of this company. Therefore, the loan given by the Company to the assessee was to be treated as deemed dividend under Section 2(22)(e) of the Act. The second re-assessment was completed under Section 143(3) r.w.s. 147 of the Act on 22.12.2017 at total income of Rs.3,26,40,300/-. Aggrieved with this order, the assessee had preferred an appeal before the First Appellate Authority which was decided vide the impugned order and the Id. CIT(A) had restricted the addition on account of deemed dividend under Section 2(22)(e) of the Act to the extent of accumulated profit of the company. Now, the Revenue is in appeal before us.

3. The following grounds have been taken by the Revenue in this appeal:

- “i) *Whether, the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts in restricting the disallowance of Rs.3,08,90,000/- made by the AD on account of deemed*

dividend to the extent of accumulated profit of M/s Shri Rang Infrastructure for A.Y.2010-11 i.e. Rs.103,18,143/-.

- ii) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) ought to have upheld the order of the Assessing Officer.*
- iii) It is, therefore prayed that the order of the Ld. Commissioner of Income-tax (Appeals) may be set aside and that of the Assessing Officer be restored.*
- iv) The appellant prays for leave, to amend or alter any ground or add a new ground which may be necessary.”*

4. In the course of hearing, an application under Rule 27 of the ITAT Rules was made by the assessee and the following ground was raised:

“That the learned CIT(A) has grievously erred in confirming the re-opening of assessment u/s 147 of the Act, whereas, it ought to have been held as invalid, as re-opening is beyond 4 years and original assessment was framed u/s 143(3), then again order is passed u/s 143 (3) rws 147 and this is the second re-opening of assessment, which is invalid as per Proviso to section 147 of the Act.”

5. It is found that no CO was filed by the assessee against the appeal preferred by the Revenue. As per Rule 27 of ITAT Rules, the respondent, even though he may not have appealed, may support the order appealed against on any of the grounds decided against him. It is found that the assessee had taken a legal ground before the Ld. CIT(A) on the issue of invoking the provision of Section 147 of the Act which was decided against the assessee by the Ld. CIT(A). The ground taken by the assessee in Rule 27 pertains to reopening of the assessment under Section 147 of the Act. Since, this ground was decided against the assessee by the

Ld. CIT(A), the assessee is entitled to raise this ground before us in terms of provision of Rule 27 of the ITAT Rules. Accordingly, the ground as raised by the assessee under Rule 27 is admitted. Further, as the ground of the assessee goes to the root of jurisdiction of the AO, we deem it proper to adjudicate this ground first.

6. Shri M. K. Patel, Ld. Counsel for the assessee submitted that the second reopening of the case was beyond four years and, therefore, the First Proviso of Section 147 of the Act was applicable in this case. This Proviso stipulated that no reopening can be done after the expiry of 4 years unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. The Ld. AR contended that there was no failure on the part of the assessee to disclose fully and truly any material facts and, therefore, the assumption of jurisdiction by the AO under Section 147 of the Act was not correct. He has drawn our attention to the reasons as recorded by the AO and submitted that the AO also did not record any failure on the part of the assessee in the reasons as recorded by him. The Ld. AR further submitted that the Ld. CIT(A) had erred in dismissing the legal ground as raised by the assessee. The Ld. CIT(A) had only considered the sufficiency of information and the issue of change of opinion on the part of the AO but the basic question of there being no failure on the part of the assessee was not examined by him.

7. Per contra, Shri Atul Pandey, Sr. DR strongly supported the orders of the AO and the Ld. CIT(A). He explained that the case was reopened on the basis of specific information received by the AO regarding escapement of deemed dividend under Section 2(22)(e) of the Act, on the basis of which, the AO had rightly assumed the jurisdiction under Section 147 of the Act. He further submitted that the assessee had not disclosed the deemed dividend under Section 2(22)(e) of the Act in his return. Therefore, there was a failure on the part of the assessee to disclose fully and truly all the material facts.

8. We have carefully considered the rival submissions. There is no dispute to the fact that the matter was examined twice by the AO in the original and the re-assessment. This is the second reopening of the case carried out after completion of 4 years from the end of the assessment order. Therefore, the Proviso of Section 147 of the Act was squarely applicable to the second reopening. The said proviso is found to be as under:

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure ⁷⁶ on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts ⁷⁶ necessary for his assessment, for that assessment year:

9. As per this proviso, the AO cannot assume jurisdiction under Section 147 of the Act after expiry of four years until and unless it is demonstrated that any income chargeable to tax had

escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. In fact, such default of the assessee has to be specifically recorded in his satisfaction/reason while reopening the case under Section 147 of the Act. The Revenue has filed a paper book containing 1 to 100 pages and the reason as recorded by the AO is found to be as under:

“In this case, assessee filed its return of income for A.Y. 2010-11 on 30/03/2011 declaring income of Rs. 10,45,850/-. The same was assessed u/s. 143(3) at Rs. 10,99,300/- on 25/01/2013. Assessment was reopened and order u/s. 143(3) r.w.s. 147 was passed on 17/03/2016 at Rs. 17,50,300/-.

During the course of assessment proceedings in the case of Shri Rang Infrastructure Pvt. Ltd A.Y. 2010-11. It was observed that the assessee has given loan of Rs. 3,08,90,000/- to Shri Jayantibhai S. Patel (PAN:- ADGPPB465R) who is having Rs. 4,99,400/ share out of Rs. 10,00,000/- shares Le. more than 10% share holding in the company. The balance sheet of the assessee shows reserve of Rs. 9,32,48,550/-. Therefore I have reasons to believe that the loans given to Shri Jayantibhai S. Patel is to be treated as deemed dividend as provided u/s. 2(22)(e) of the act.”

10. It is found from the above reason that no specific satisfaction was recorded by the AO that there was a failure on the part of the assessee to disclose fully and truly all material facts. In the absence of any specific mention of such failure of the assessee, we have to next examine whether any such failure can be made out from the records as available. The loan taken by the assessee from Shri Rang Infrastructure Pvt. Ltd. was already disclosed in the accounts of the assessee.

11. The Ld. CIT(A) has observed that the balance sheet of the assessee did not reflect the name of this company for giving the loan to the assessee, but, the figures of unsecured and secured loans were mentioned and that there were no details available either in the return of income and accompanied documents and in the details furnished during the course of assessment or first re-assessment proceedings. There is no requirement to disclose the name of the parties from whom loan is taken in the balance sheet but only cumulative figure of loan appears therein. Further, there is also no requirement to file details of all the persons from whom loan was obtained along with the return of income. These details can be furnished by the assessee only if the AO makes specific query in this regard in the course of assessment. Neither the AO nor the CIT(A) have made out in case that the details of loan was called for from the assessee in the course of original or reopened proceeding, but it was not furnished by the assessee. If the AO doesn't ask for details in respect of loans appearing in the balance sheet, there was no occasion for the assessee to furnish these details. As per the norm of assessment, the details of unsecured loan is invariably called for in the assessment proceeding along with the confirmation. The AO has not brought out any default of the assessee in this respect either in the original or in the first reopened proceeding. Therefore, the fact that there was any default on the part of the assessee in furnishing the required information is not evident from the reason of the AO as well as from the order of the Ld. CIT(A).

12. The Ld. CIT(A) has upheld the reopening on the ground that there was a new information available with the AO to reopen the case. That by itself is not sufficient to reopen the case beyond 4 years. It must be first established that there was a failure on the part of the assessee to disclose fully and truly all material facts and such failure has not been established either by the AO or by the Ld. CIT(A). As regarding the issue of deemed dividend on which the second reopening was done, there can be failure on the part of the assessee only when there is requirement as per law to disclose the deemed dividend in the return of income or in the tax audit report and which has not been complied. It is found that there was no requirement to declare any deemed dividend under Section 2(22)(e) of the Act in the ITR or in the Tax Audit Report for this year. These requirements were introduced in the ITR Form and in the Tax Audit Report much later. Under the circumstances, the assessee cannot be charged with any failure to disclose fully or truly all material facts.

13. It was explained by the assessee that account with the company was in the nature of current account and as per finding recorded by the Ld. CIT(A), there were 35 transactions during the year. It was specifically noted by the Ld. CIT(A) that there was opening debit balance of Rs.10,22,085/- and closing debit balance of Rs.13,43,075/- in the ledger account of the company. Considering these facts, the Ld. CIT(A) had given the following specific finding:

“5.3 I have considered the above-referred latest decision throwing light on the issue. Since in the case of the appellant, there was closing credit balance of Rs. 13,43,075/- as on 31.03.2010 which is the amount of loan taken from the company which remained to be settled, this amount only can be taken as Deemed Dividend for the assessment year under consideration. Further, the interest of Rs.3,61,289/- cannot be considered to be loan or advance and if this amount is reduced, then the outstanding loan would be of Rs.9,81,786/- only. Since the A.O. has not verified as to what was the accumulated profit in the balance-sheet as on 31.03.2010 but referred to only reserves to the tune of Rs.9,32,48,550/- in the last paragraph of the assessment order without substantiating this figure by obtaining the copy of the Profit & Loss Account and the balance-sheet for the assessment year under consideration. Therefore, the A.O. is directed to verify from the case-records of M/s Shree Rang Infra Pvt. Ltd. and to restrict the deemed dividend to the extent of accumulated profit, if found to be less than this amount.”

14. It is, thus, clear from the above reasoning of the Ld. CIT(A) that the transaction of the assessee with Shri Rang Infrastructure Pvt. Ltd. was in the nature of current account transaction and the entire cumulative credit of Rs.3,08,90,000/- could not have been held as deemed dividend, as done by the AO. In fact, the Ld. CIT(A) had taken the closing balance of Rs.13,43,075/- only as deemed dividend and the ground taken by the Revenue that the deemed dividend was restricted to Rs.1,03,18,143/- is not found correct. As per direction of the Ld. CIT(A), only the closing credit balance of Rs.13,43,075/- was required to be verified with reference to accumulated profit of the company.

15. In view of the above facts, we are of the considered opinion that there was no failure on the part of the assessee to disclose fully and truly all the material facts and, therefore, the jurisdiction of the AO under Section 147 of the Act was not

correctly assumed. The fact of any failure on the part of the assessee was neither brought out by the AO nor was evident from the record, which was essential for reopening the case beyond 4 years. Therefore, the reopening done by the AO was incorrect and not in accordance with the 1st Proviso to Section 147 of the Act. Therefore, the ground as taken by the assessee is allowed and the reopening of the case under Section 147 of the Act is quashed.

16. As the legal ground taken by the assessee is allowed, we do not deem it necessary to examine the grounds raised by the Revenue on merits. Therefore, all the grounds taken by the Revenue are rejected.

17. In the result, appeal preferred by the Revenue is dismissed.

This Order pronounced on 05/07/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Ahmedabad; Dated 05/07/2024

S. K. SINHA

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1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad