1318

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, HON'BLE VICE PRESIDENT
AND
SHRI A.D. JAIN, JUDICIAL MEMBER

ITA No.3083/Del/2011
Assessment Year : 2008-09

ITO, Ward 14 (1), Room No.209, CR Building, IP Estate, New Delhi.	Vs.	Paralube India Pvt. Ltd., 18A, Wing F, 3rd Floor, Local Shopping Complex, Naraina, New Delhi. PAN : AADCA5581C
(Appellant)		(Respondent)

Assessee by	:	Shri Ved Jain, CA
Revenue by	:	Shri Satpal Singh, Sr.DR

ORDER

PER A.D. JAIN, JUDICIAL MEMBER

This is an appeal filed by the Department for Assessment Year 2008-09. The following grounds of appeal have been taken:-

"1. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the disallowance of Rs.1,37,455/- made on account of loss from Chit Account. Ld. CIT (A) did not appreciate the fact that the assessee failed to establish that the funds were procured and utilized for the business purposes.

2. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.2,00,250/- made on account of disallowance of repair and maintenance expenses.

3. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.1,42,236/- made on account of disallowance of charge of excess depreciation claimed @ 30% on building inclusive the cost of land.

4. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.40,792/- made on account of disallowance of payment excess interest.

5. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.15,32,791/- which was added by treating the same as deemed dividend in the hands of the assessee company u/s 2 (22) (e) of the IT Act, 1961. The Ld. CIT (A) further erred in holding that this amount can be brought to tax only in the hands of the shareholder of the lender company i.e., Shri Dinesh Sharma and not in the hands of the appellant company.

6. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in ignoring the fact that in order to interpret the term "such shareholder", the first limb of the definition of section 2 (22)(e) has to be read in conjunction with the second limb of the section, wherein any payment by a closely held company by way of advance to "a shareholder" (being a person having beneficial ownership of shares of the said company) or to a concern in which such shareholder is also a member/partner would come under the ambit of deemed dividend. In this case, the 'concern' being the assessee company, in which, 'such shareholder' i.e., Shri Dinesh Sharma had substantial interest would bring the assessee company within the purview of section 2 (22)(e) of IT Act, 1961."

2. Apropos ground No.1, the facts are that the assessee incurred a loss of ₹ 1,37,455/- on chit and claimed as expenses. The Assessing Officer disallowed the same on the ground that the chit amount was not utilized for the purpose of business relying on the judgement of Hon'ble Punjab and Haryana High Court in the case 'M/s Soda Silicate and Chemical Works vs CIT', 179 ITR 588 (P&H). The Assessing Officer further held that these expenses related to earlier year. The Assessing Officer also relied on the judgement of the Hon'ble Madras High Court in the case 'Madras Fertilizers Ltd. vs. CIT', 209 ITR 174 (Mad).'

3. The Ld. CIT (A) deleted the disallowance.

4. The Ld. DR has contended that the Ld. CIT (A) has erred in deleting the disallowance of Rs.1,37,455/- made on account of loss

from Chit Account without appreciating the fact that the assessee failed to establish that the funds were procured and utilized for the business purposes.

5. The ld. counsel for the assessee, on the other hand, has placed strong reliance on the impugned order. A copy of 'Billahari Investment Pvt. Ltd.', 299 ITR 1 (SC) [relied on by the Ld. CIT (A)] has been placed before us.

6. In this regard, it is seen that as per the statement of utilization of funds, it stood established that the funds received by the assessee under the chit fund had been procured and utilized for its business purposes. The assessee was following the completed contract method for loss/gain on funds accrued under chit funds scheme and this method was consistently followed by the assessee. Under similar circumstances, in 'Billahari Investment Pvt. Ltd.' (supra), approving the decision of the Hon'ble Madras High Court in the case reported as 'Billahari Investment Pvt. Ltd.', 288 ITR 39 (Mad), has decided the matter in favour of the assessee. The Ld. CIT (A) has correctly taken into consideration this decision of the Hon'ble Supreme Court. Therefore, finding no merit therein, ground No.1 raised by the department is rejected.

7. Apropos ground No.2, the facts are that the assessee has incurred expenses of ₹ 3,20,000/- on repairs and maintenance during the year under consideration. These expenses included ₹ 1,20,000/- pertaining to repair of damaged false ceiling, white wash expenses of ₹ 1,00,000/- and balance expense of ₹ 1,00,000/- for repair of toilets and kitchen. The Assessing Officer disallowed ₹ 2,22,500/- out of the repairs and maintenances expenses of ₹ 3,20,000/-, being the amount of ₹ 1,22,500/- (correct amount is ₹ 1,20,000/-) incurred on the repair of damaged false ceiling and the amount of ₹ 1,00,000/- incurred on

repair of toilets and kitchen, as capital in nature, and allowing depreciation of ₹ 22,250/- on the same the net disallowance was worked out to be ₹ 2,00,250/-. The Assessing Officer placed reliance on 'Prestige Foods Ltd. vs. CIT', 61 ITD 390 (Indore) and 'M/s M.N. Dastur & Co. Ltd. vs. DCIT', 62 ITD 113 (Bang.).

8. The Ld. CIT (A) having deleted the addition, ground No.2 has been raised before us.

9. The Ld. DR has contended that the Ld. CIT (A) has erred in deleting the addition of ₹ 2,00,250/- correctly made by the Assessing Officer on account of disallowance of repair and maintenance expenses; that while doing so, the Ld. CIT (A) has erred in ignoring the findings of the Assessing Officer to the effect that the false ceiling got installed by the assessee did not amount to repair and maintenance and an amount of ₹ 1,22,500/- had been made by the assessee for a new gypsum board, which had not been earlier fitted with the false ceiling and that by installing such a new board, the power and capacity of the ceiling had been enhanced for a longer period; that the repair in the toilets and kitchen, amounting to ₹ 1 lac also did not amount to expenditure on repairs, since the work i.e., civil and plumbing work included installation of new GI pipes, new wash basin and wash basin board, exhaust fan, overhead ceiling, new taps and utensil wrack for pantry, enhancing the life of the asset.

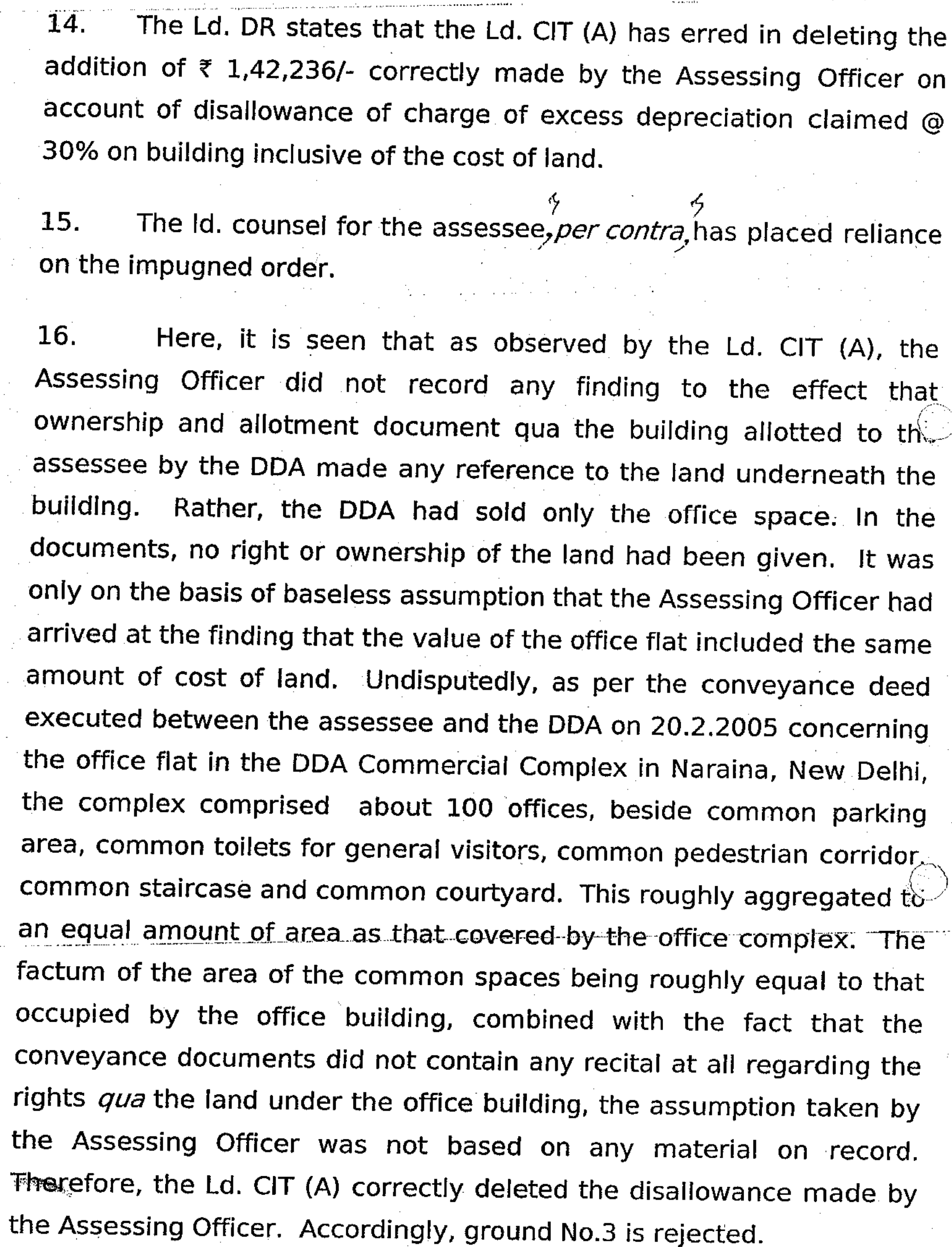
10. The ld. counsel for the assessee, on the other hand, has, again, placed reliance on the CIT (A)'s order.

11. The Ld. CIT (A), it is seen, has duly taken into consideration the fact that the invoice of the contractor clearly demonstrated that the repair and replacement of false ceiling had been carried out to do away with the seepage caused due to rain water. Though the false

ceiling measured 4000 sq. ft, the repair was only of the damaged portion, which measured 2500 sq. ft. The damaged portion of the ceiling was replaced. The new gypsum board replaced the old one and no new asset or enduring benefit was brought into existence and so there was no enhancement in the power or capacity as contended by the Assessing Officer. The capacity was not shown to have been increased, nor the design to have been altered by the repairs done either to the ceiling or the toilets. Had the repairs not been carried out, the office flat would have been rendered un-useable. The facts in 'Prestige Foods' (supra) are different, as therein, it was held that change in design and capacity of plant is capital expenditure, which is not the case herein. In 'M.N. Dastur & Co.' (supra), it was held that expense for constructing the new toilet and pantry is a capital expenditure. Here again, the facts are not in *pari materia* inasmuch as in the assessee's case, no new toilet was constructed and only necessary repairs were carried out to make the toilets and kitchen suitable to the needs of the staff and the assessee's clients by replacing old items with new ones. The pantry and the toilets were already in existence, the assessee's business having started in 2005.

12. The Ld. CIT (A), it is seen, has duly taken into consideration the above facts and circumstances while deciding the issue in favour of the assessee. We do not find the order on this issue to be erroneous at all. Hence, ground No.2 is rejected.

13. Coming to ground No.3, the assessee had claimed depreciation of ₹ 4,74,120/- on office flat purchased in February, 2005. The Assessing Officer disallowed depreciation to the tune of ₹ 1,42,236/- assuming the value of the land at the estimated rate of 30% of the cost of building. The Ld. CIT (A) deleted the disallowance of the depreciation claimed by the assessee.



14. The Ld. DR states that the Ld. CIT (A) has erred in deleting the addition of ₹ 1,42,236/- correctly made by the Assessing Officer on account of disallowance of charge of excess depreciation claimed @ 30% on building inclusive of the cost of land.

15. The ld. counsel for the assessee, *per contra*, has placed reliance on the impugned order.

16. Here, it is seen that as observed by the Ld. CIT (A), the Assessing Officer did not record any finding to the effect that ownership and allotment document qua the building allotted to the assessee by the DDA made any reference to the land underneath the building. Rather, the DDA had sold only the office space. In the documents, no right or ownership of the land had been given. It was only on the basis of baseless assumption that the Assessing Officer had arrived at the finding that the value of the office flat included the same amount of cost of land. Undisputedly, as per the conveyance deed executed between the assessee and the DDA on 20.2.2005 concerning the office flat in the DDA Commercial Complex in Naraina, New Delhi, the complex comprised about 100 offices, beside common parking area, common toilets for general visitors, common pedestrian corridor, common staircase and common courtyard. This roughly aggregated to an equal amount of area as that covered by the office complex. The factum of the area of the common spaces being roughly equal to that occupied by the office building, combined with the fact that the conveyance documents did not contain any recital at all regarding the rights *qua* the land under the office building, the assumption taken by the Assessing Officer was not based on any material on record. Therefore, the Ld. CIT (A) correctly deleted the disallowance made by the Assessing Officer. Accordingly, ground No.3 is rejected.

17. So far as regards ground No.4, the assessee had taken unsecured loans of ₹ 5,97,561/-. Interest of ₹ 1,06,204/- was paid thereon, which amount was claimed as expenditure. The Assessing Officer disallowed interest amounting to ₹ 40,792/- out of the total interest claimed, stating that the interest had been paid at a rate higher by 10.66% being interest paid @ 22.66%, whereas according to the prevailing market conditions, the rate of interest in case of banks and financial institutions generally ranged around 12%.

18. The Ld. CIT (A) deleted the disallowance.

19. The Ld. DR contends that the Ld. CIT (A) has erred in deleting the addition of Rs.40,792/- made on account of disallowance of payment of excess interest. The ld. Counsel for the assessee relied on the impugned order.

20. It has not been disputed before us that the Assessing Officer had wrongly taken the rate of 22.66% as the interest rate. The interest had been paid @ 15% and 18%. The assessee had taken land from private sources and not from banks. The interest rate thereon was correctly taken by the Ld. CIT (A) to be at the prevailing market rates. It has not been shown otherwise. As such, ground No.4 is rejected.

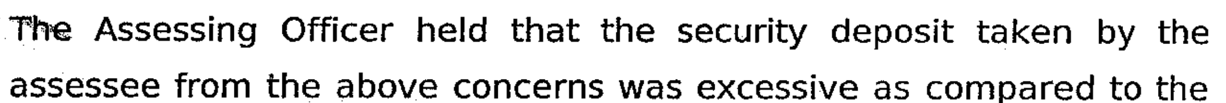
21. Concerning ground Nos.5 and 6, the Assessing Officer treated ₹ 17,68,000/-, i.e., security deposit as loan or advance. Out of this amount, an amount of ₹ 15,32,791/- was treated as deemed dividend u/s 2 (22)(e) of the IT Act. The Assessing Officer treated the security deposit as loan, observing that the security deposit had not been received as per the rent agreement. It was also observed that the security amount had not been as per the prevailing market conditions and norms. The Ld. CIT (A) deleted the addition.

22. The Ld. DR states that the Ld. CIT (A) has erred in deleting the addition of Rs.15,32,791/- which was added by treating the same as deemed dividend in the hands of the assessee company u/s 2 (22) (e) of the IT Act, 1961; that the Ld. CIT (A) further erred in holding that this amount can be brought to tax only in the hands of the shareholder of the lender company, i.e., Shri Dinesh Sharma and not in the hands of the appellant company; that the Ld. CIT (A) has erred in ignoring the fact that in order to interpret the term "such shareholder", the first limb of the definition of section 2 (22)(e) has to be read in conjunction with the second limb of the section, wherein any payment by a closely held company by way of advance to "a shareholder" (being a person having beneficial ownership of shares of the said company) or to a concern in which such shareholder is also a member/partner would come under the ambit of deemed dividend; and that in this case, the 'concern' being the assessee company, in which, 'such shareholder' i.e., Shri Dinesh Sharma had substantial interest would bring the assessee company within the purview of section 2 (22)(e) of IT Act, 1961.

23. The ld. counsel for the assessee has strongly relied on the impugned order.

24. It is observed that the assessee is in the business of providing administrative and business support services. During the year in question it had the following two clients who were its sister concerns:-

i) Ultrapure Technology and Appliances India Ltd.; and
ii) CATA Appliances Ltd.


The Assessing Officer held that the security deposit taken by the assessee from the above concerns was excessive as compared to the

prevailing market conditions and norms. The security deposit was treated by the Assessing Officer as follows:-

Name of the client	Amount of Security Deposit	Treated by A.O. as Security Deposit	Treated by the A.O. as loan	Treated by A.O. as Deemed Dividend
Ultrapure Technologies	10,00,000	₹66,000	9,34,000	9,34,000
CATA Appliances	9,00,000	66,000	8,34,000	5,98,791
Detailed Total	19,00,000	1,32,000	17,68,000	15,32,791

25. It has not been disputed that the security deposit was received in accordance with the terms of the rent agreements dated 27.09.2005. Therefore, the Assessing Officer went wrong in observing that the security deposit was not in accordance with the agreements. There also was no basis for bifurcating the security deposits into two parts, i.e., security deposit and loan. In fact, other than the rent part, the assessee was also providing support services to its clients, by providing different types of equipment, furniture, computer, etc. to them. This was the reason why other than the service charges, security at a higher rate was taken, which was undisputedly in keeping with the assessee's commercial expediency.

26. Further, the assessee has not been shown to be a shareholder in any of the companies, nor was it a beneficial owner of shares in any of the companies. It also had not obtained any substantial interest in these companies. Further, no loan or advance was taken by it during the year from any of the companies. As such, when there was no loan transaction, the Assessing Officer was obviously wrong in holding a loan to be existing. The Ld. CIT (A) has also appropriately considered the decision in 'ACIT vs. M/s Bhaumik Color (P) Ltd.', 118 ITD 1 (Mum) (SB) to hold that since the assessee company was not a shareholder of the lender companies, the amount of loan cannot be added in the hands of the assessee company as deemed dividend u/s 2 (22)(e) of the Act. The Ld. CIT (A) also correctly followed 'CIT vs. Hotel Hill Top',

313 ITR 116 (Raj), wherein it was held that deemed dividend cannot be brought to tax in the hands of a non-shareholder. 'C.P. Sarathy Mudaliar', a Supreme Court decision holding that 'shareholder' in the context of deemed dividend refers only to registered shareholder, as confirmed in 'Rameshwarlal Sanwarmal vs. CIT', (1980) 122 ITR 1 (SC), has also been correctly followed by the Ld. CIT (A). Undisputedly, Shri Dinesh Sharma, the shareholder of the lender company has 30% shares in M/s CATA Appliances Ltd. and 31% shares in M/s Ultrapure Technology and Appliances (I) Ltd. and the Ld. CIT (A) has rightly observed that action is to be taken in his hands, as per law.

27. In view of the above, here also, the order of the Ld. CIT (A) is on all fours and it is confirmed, rejecting ground Nos. 5 and 6.

28. In the result, the appeal filed by the Department is dismissed.

The order pronounced in the open court on 17.05.2013.

[G.D. AGRAWAL]
VICE PRESIDENT

[A.D. JAIN]
JUDICIAL MEMBER

Dated, 17.5, 2013.

dk

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order,

Deputy Registrar,
ITAT, Delhi Benches

Assistant Registrar
Income-tax Appellate Tribunal
Delhi Benches, New Delhi