

**आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ “बी” चण्डीगढ़  
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH  
BENCH ‘B’ CHANDIGARH**

**BEFORE: SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &  
SHRI R.L.NEGI, JUDICIAL MEMBER**

आयकर अपील सं./ ITA No. 1507/CHD/2019

निर्धारण वर्ष / Assessment Year : 2013-14

|   |        |  |
|---|--------|--|
| M/s International Fresh Farm Products (India) Ltd.,<br>H.No. 3, Secstor-5,<br>Chandigarh. | Versus | The DCIT,<br>Circle-1(1),<br>Chandigarh. |
| स्थायी लेखा सं./PAN NO: AAACI5038D  |        |  |
| अपीलार्थी/Appellant   |        | प्रत्यर्थी/Respondent                    |

(Virtual Court)

निर्धारिती की ओर से/Assessee by : Shri Parikshit Agarwal, CA

राजस्व की ओर से/ Revenue by : Smt. Priyanka Dhar, JCIT

सुनवाई की तारीख/Date of Hearing : 28.09.2021

उद्घोषणा की तारीख/Date of Pronouncement : 30.09.2021

**आदेश/Order**

**PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER:**

The above appeal has been preferred by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-I, Chandigarh [(in short the ('Ld.CIT(A)] dated 25.09.2019 relating to assessment year 2013-14 passed u/s 250(6) of the Income Tax Act, 1961 (hereinafter referred to as 'Act'.

2. Ground No. 1 & 6 raised by the assessee are general in nature and need no adjudication.

Ground No. 2 raised by the assessee reads as under :

*“2. That on facts, circumstances and legal position of the case, Worthy CIT(A) has erred in confirming the action of Ld. AO wherein he made addition of Rs. 3,15,616/- u/s 36(l)(iii) of the Act on estimated, arbitrary, presumptive and prejudiced basis without assigning any logical reasons and had erroneously disallowed the proportionate interest on advance given for business purpose to M/s Temptation Foods as interest free advance.”*

3. The issue relates to disallowance of interest amounting to Rs. 3,15,616/-, as per provisions of Section 36(1)(iii) of the Act, pertaining to interest free advances made to M/s Temptation Foods amounting to Rs. 50 lacs treating the same to be not for the purpose of business of the assessee.

4. The ld. counsel for the assessee drew our attention to the fact that the impugned advance to M/s Temptation Foods had been made in the preceding year i.e. assessment year 2012-13 and identical disallowance had been made in the said year also which issue had travelled upto the ITAT who had restored the matter to the AO with the direction to determine the funds used for the purpose of making the advance and thereafter adjudicate the issue in accordance with law. That the AO on re-consideration of the issue had deleted the disallowance

noting that the advance had been made out of current account and that all the interest bearing funds had been used for the purpose of business of the assessee. In this regard he drew our attention to the following :

- i) Copy of ledger account of M/s Temptation Foods in the books of the assessee for the impugned assessment year reflecting Rs. 50 lacs received from M/s Temptation Foods as an opening balance out of which Rs. 25 lacs was returned on 19.4.2012. The said document was placed before us at Paper Book page 22.
- ii) The order of the Ld.CIT(A) for the preceding assessment year, i.e. A.Y 2012-13, against order passed u/s 143(3) for the said year making addition/disallowance of interest on the impugned advance. Same was placed before us at Paper Book page 73-78. Our attention was drawn to Paper Book page 75-77 where impugned order was discussed by the ld. CIT(A) at para 3 to 3.3.1 and disallowance made was upheld.
- iii) The order of the ITAT in appeal filed by the assessee against the aforesaid order of the Ld.CIT(A) for A.Y 2012-13 placed before us at Paper Book page 79-108. Our attention was drawn to pages 102 to 105 where the issue of disallowance u/s 36(1)(iii) of the Act for assessment year 2010-11 was adjudicated by the ITAT remanding the matter to the AO to verify that no interest bearing funds had been used for the purpose of making the advance and thereafter to

Paper Book page No. 107 wherein identical issue relating to assessment year 2012-13, pertaining to advances made to M/s Temptation Foods, was also restored back to the AO for verifying the funds used for the purpose of making advance.

- iv) The order of the AO in restored proceedings placed before us at Paper Book page 121-129, pointing out therefrom at page 129 the findings of the AO to the effect that, after considering the assessee's submissions, in view of the directions of the ITAT in the order passed for assessment year 2012-13, the advances had been given from the current account of the assessee and no cash credit facility had been availed, that the assessee was having sufficient interest free funds and that the assessee had only term loans which were used for acquisition of fixed assets. That after finding so, the AO made no additions/ disallowance of interest u/s 36(1)(iii) of the Act to the income of the assessee.

5. The ld. counsel for the assessee contended that since the year in which the advance was given, it was found that the advances had been made from interest free funds, there was no reason to make any disallowance of interest u/s 36(1)(iii) of the Act in the impugned year and that the issue was clearly covered by the aforestated orders for the preceding year.

6. The ld. DR on the other hand relied on the order of the CIT(A) that the assessee had neither demonstrated business

purpose for making the impugned advance nor that it had used interest free funds for making the advance. She further pointed out that identical disallowance made in AY 2014-15 was not deleted in appeal by the ITAT.

7. The Ld.Counsel for the assessee countered by stating that in A.Y 2014-15 the assessee had not pressed the ground raised considering the insignificant amount involved of Rs.26,926/-. He drew our attention to the order of the ITAT in A.Y 2014-15 placed at paper book page no.130-135 bringing out the said facts.

8. We have heard both the parties. It is not denied that identical disallowance of interest on the said advance of Rs. 50 lacs to M/s Temptation Foods had been made in the preceding assessment year also and after various rounds of litigation, when the issue had been restored to the AO by the ITAT directing him to determine the nature of funds used for the purpose of making the advance, it was found by the AO that no interest bearing funds had been used and infact interest free funds in the current account of the assessee had been used for the purpose of making the advance. This conclusive finding of fact, therefore, puts an end to all dispute vis-à-vis the issue of disallowance of interest on the advance given to M/s Temptation Foods, since it has been factually found by the

department that interest free funds had been used for the purpose of making the advance. No occasion arises, therefore, for making any disallowance of interest u/s 36(1)(iii) of the Act with regard to the same. The reliance placed by the Revenue on the decision of the ITAT in A.Y 2014-15, is of no relevance since the ground was not adjudicated being not pressed by the assessee.

Ground of appeal No.2 is therefore, allowed.

9. Ground No. 3 raised by the assessee reads as under :

*“3. That on facts, circumstances and legal position of the case, the worthy CIT(A) has erred in confirming the action of the Ld. AO wherein he made addition of Rs. 27,20,000/- u/s 2(22)(e) even when the appellant company is not a shareholder of Punjab Metalics P. Ltd. and there is only common shareholders between the 2 companies.*

10. The issue relates to treatment of an amount of Rs. 27,20,000/-, received by the assessee from M/s Punjab Metalics during the year, as deemed dividend as per the provisions of Section 2(22)(e) of the Act.

11. The addition was made by the AO and upheld by the Ld.CIT(A), on finding that the Managing Director(MD) of the assessee company, Sh.Sukhinder Singh, was holding 72.26% shares in the assessee company and 45.39% shares in M/s Punjab Metalics P.ltd, thus having substantial interest in M/s Punjab Metalics P.ltd. and owning more than 10% shares in

the assessee company and further on finding that there was sufficient reserves and surplus of Rs. 1,28,62,690/- in M/s Punjab Metallica P.ltd. for treating the amount advanced by it to the assessee company as deemed dividend.

12. The contention of ld. counsel for the assessee was that the ld. CIT(A) had made disallowance basis the order passed by the CIT(A) in assessment year 2014-15 which order had been agitated before the ITAT who in turn had decided the issue in favour of the assessee by following the order of the jurisdictional High Court in the case of CIT Vs Sharman Woolen Mills Ltd.(2012) 204 Taxman 82 (P&H) noting that dividend could be taxed only in the hands of the shareholders and it was the MD who was shareholder in M/s Punjab Metallica P.ltd. and not the assessee company and therefore, the deemed dividend could be taxed in the hands of the MD only. Copy of the order was placed before us at P.B 130-135.

13. Ld.DR on the other hand relied on the order of the Ld.CIT(A) contending that the conditions specified in section 2(22)(e) of the Act admittedly stood fulfilled in the present case and therefore the amount received by the assessee from Punjab Metallica had been rightly treated as deemed dividend in its hands.

14. The Ld.Counsel for the assessee was asked at bar to explain the position of law vis a vis the issue considering the decision of the apex court in the case of National Travel Services vs CIT CA No.2068-2071 of 2012 dated January 18 2018.

15. To this, the Ld.Counsel for the assessee placed a compilation of judgments before us consisting of 11 judgments. Referring to the same he contended that the issue in the case of National Travel Services Vs. CIT ,which travelled upto the Supreme Court and was referred to a larger bench was a different aspect relating to interpretation of the provisions of section 2(22)(e) of the Act. He pointed out that in the case of CIT Vs. Ankitech Private Limited & Others, 340 ITR 14 (Del), the Hon'ble High court had identified three limbs of section 2(22)(e) as being:

Any payment by a company, not being a company in which the public are substantially interested, by way of advance or loan

- 1) to a shareholder, being a person who is the beneficial owner of shares;
- 2) to any concern in which such shareholder is a member or a partner and has substantial interest;



- 3) or any payment by such company on behalf or for the individual benefit of any such shareholder.

16. He pointed out that while in Ankitech (supra) and CIT Vs. Madhur Housing & Development Company (Del HC) ITA No.721/2011, the Hon'ble Delhi High Court dealt with the second limb and interpreted it to be only enlarging the definition of dividend, holding that the deemed dividend can be taxed only in the hands of shareholder and not the concern receiving it, which proposition he pointed out was upheld by the Apex court in CIT Vs. Madhur Housing & Development Company 401 ITR 152(SC). In the case of National Travel Services Vs. CIT 347 ITR 305(Del), he pointed out that the issue related to the first limb where loan or advance given to a "*shareholder being a person who is the beneficial holder of share*", was to be interpreted as to referring to both a registered shareholder and a beneficial shareholder or only a beneficial shareholder. It was this issue which travelled to the Hon'ble supreme court who noted the view taken by the Hon'ble Delhi High Court in one of the cases of the group in which the lead case was Ankitech Private Limited as referring both to registered and beneficial shareholder, and expressed their disagreement with the same. The matter was accordingly referred to a larger bench, he pointed out. The Ld.Counsel for the assessee thereafter pointed out that subsequently this

matter was dismissed as withdrawn when it came up before the larger Bench since the assessee had settled the dispute in the 'Vivad se Visvash Scheme, 2020'. The Ld.Counsel for the assessee further pointed out the decision of the Hon'ble Bombay High Court in the case of PCIT Vs. Sunjewels International Limited, 411 ITR 613 and CIT Vs. M/s T. Abdul Wahid & Company, 428 ITR 426 pointing out therefrom that in both the decisions the Hon'ble High Court had distinguished the case before the Hon'ble Supreme Court in the case of National Travel services (supra) being in relation to a different issue as opposed to that as decided by the Hon'ble Delhi High Court in the case of Ankitech Private Limited & Others (supra) pertaining to the taxability to deemed dividend being possible only in the hands of shareholder. He, therefore, contended that the decision of the Hon'ble Delhi High Court in the case of Ankitech Private Limited & Others (supra) was good law and had been reiterated by the Hon'ble Jurisdictional High Court in the case of Sherman Woollen Mills (supra), following which the ITAT had deleted the addition in the case of the assessee for assessment year 2014-15.

17. We have heard both the parties and have also gone through the decisions cited by the Ld.Counsel for the assessee before us. We are convinced that the issue referred by the apex court to a larger bench is not relevant on account of withdrawal

of the appeal by the assessee having opted for settlement under the Direct tax Vivad se Vishwas Act,2020 and also on account of the fact that the issue involved related to a different aspect of section 2(22)(e) of the Act as opposed to that before us. As rightly pointed out by the Ld.Counsel for the assessee while the issue before us is whether loans and advances given to a concern which qualifies as deemed dividend as per section 2(22)(e) of the Act, would be taxable in the hands of the concern which itself is not a shareholder of the company advancing the same. In the case of National Travel services (supra) however the issue was different whether shareholder, receiving loan or advance from a company qualifying as deemed dividend, is to be a registered and/or beneficial shareholder.

18. As for the issue before us, the Hon'ble Apex court in the case of Madhur Housing (supra) has affirmed the proposition of law laid down by the Hon'ble Delhi high court in the said case that deemed dividend can be taxed only in the hands of a person who is a shareholder of the lender company and not in the hands of the borrowing concern in which such shareholder is member or partner having substantial interest.

19. Having said so, since in the present case the assessee is not a shareholder of M/s Punjab Metalics Limited from which it has received the impugned advance of Rs.27,20,000/- and the same though qualifies as deemed income u/s 2(22)(e) of the

Act, but is not taxable in the hands of the assessee. The addition so made is, therefore, directed to be deleted.

Ground of appeal No.3 raised by the assessee stands allowed.

20. Ground No. 4 relates to disallowance made of Rs. 39,24,228/- u/s 40A(ia) on account of tax deducted at source. The ld. counsel for the assessee pointed out that this figure of Rs. 39,24,228/- was picked up from the disclosure made by the tax auditor in his tax audit report. Our attention was drawn to Paper Book page 44 wherein the said amount was reported as disallowable u/s 40A(ia) by the tax auditor, in his tax audit report. Ld. counsel for the assessee pointed out that the tax auditor had mistakenly computed the disallowance at Rs. 39,24,228/-. As per the ld. counsel for the assessee the disallowance related to two bills issued by one M/s Mohan Lal Contractor aggregating to Rs. 788680/- on which TDS was deducted by the assessee @ 10% but was required to be deducted @ 2%. Our attention was drawn to the said two bills placed before us at page 53-54. The ld. counsel for the assessee pointed out that the tax auditor had on the basis of TDS deducted by the assessee wrongly @ 10% amounting to Rs. 78868/- had calculated the amount of disallowance by assuming the TDS to have been deducted @ 2% and worked the amount disallowable at Rs. 39,24,228/-. He stated that the

disallowance actually amounted to only Rs.7,88,680/- and pleaded that it be restricted to the said extent.

21. The ld. DR, however, pointed out that Ld.CIT(A) had noted that no affidavit of tax auditor to the effect of having made such a wrong calculation had been filed by the assessee and therefore, it was not possible to believe the explanation.

22. The ld. counsel for the assessee at this juncture stated that though he had tried procuring such an affidavit but had failed to do so. He pleaded for an opportunity to prove his explanation and requested the matter be remanded to the AO for the said purpose.

23. We have heard both the parties. We find that the contention of the assessee that the amount disallowable u/s 40(a)(ia) has been mistakenly reported by the tax auditor at a higher figure cannot be simply discarded. The Ld.Counsel has made certain factual contentions while explaining the mistaken reporting, to the effect that while the assessee had deducted taxes @ 10% on the contractual payments to be disallowed of Rs. 7,88,680/-, amounting to Rs.78868/-, the auditor had assumed tax deducted @ 2% and calculated the amount disallowable basis this rate of TDS, which amounted consequently to Rs.39,24,228/-. The explanation of the Ld.Counsel for the assessee is not outrightly perverse or

unbelievable, but the facts we find, as pointed out by him need to be verified. Therefore agreeing with the plea of the Ld.Counsel for the assessee, we restore this issue to the AO to examine it afresh in the light of the contentions made by the Ld.Counsel for the assessee before us as aforestated, duly verifying all relevant facts and thereafter decide the issue in accordance with law. Needless to add the assessee be granted due opportunity of hearing.

Ground of appeal No.4 is allowed for statistical purposes.

24. Ground No. 5 reads as under :

*“5. That on facts, circumstances and legal position of the case, the worthy CIT(A) has erred in confirming the action of the Ld. AO wherein he made addition of Rs. 1,64,846/- u/s 43B in respect of service tax and PF Payable on estimated, arbitrary, presumptive and prejudiced basis without assigning any logical reasons and has erroneously disallowed some of the expenses outstanding as payable at the end of the year even when the appellant company had paid/setoff these liabilities and documents in respect of these were already submitted.”*

25. The issue relates to disallowance made of service tax and PF not having been deposited by the due date as prescribed u/s 43B of the Act amounting to Rs. 1,64,846/-. The ld. counsel for the assessee pointed out that break-up of figure was as under :

|             |              |
|-------------|--------------|
| Service Tax | Rs. 4000/-   |
| PF payable  | Rs. 160846/- |

26. He stated that he was not pressing the issue of allowability of service tax payable. Vis-à-vis issue of PF payable he pointed out that he had filed copy of ledger account of succeeding year before the Ld.CIT(A) demonstrating the payment of PF in the succeeding year.

27. The ld. DR, however, stated that the ledger account was not sufficient and the assessee needed to substantiate its explanation with necessary documentary evidence.

28. To this ld. counsel for the assessee sought further opportunity and requested the matter be restored to the AO for the said purpose.

29. We have heard both the parties. We find that the assessee had attempted demonstrating the compliance with the requirements of section 43B of the Act vis a vis the issue of PF payable, but had failed to file clinching third party evidence for which he has sought further opportunity. In the interest of justice therefore we consider it fit to give the assessee adequate opportunity to substantiate its claim and accordingly restore the issue of allowance of PF as per the provisions of section 43B of the Act amounting to Rs.1,60,846/-, to the AO to examine it afresh and thereafter decide it in accordance with law. Needless to add the assessee be given due opportunity to

produce all evidences it seeks to rely upon in support of its claim.

Ground of appeal No.5 is partly allowed for statistical purposes.

30. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 30<sup>th</sup> September, 2021.

Sd/-  
( R. L. NEGI)

न्यायिक सदस्य/ Judicial Member

“पूनम”

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant -
2. प्रत्यर्थी/ The Respondent -
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT,  
CHANDIGARH
6. गार्ड फाईल/ Guard File

Sd/-  
(ANNAPURNA GUPTA)

लेखा सदस्य/ Accountant Member

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar