

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**
**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No. 3767/Mum/2012
Assessment Year: 2006-07**

ITA-8(1)(3) R.No. 206, 2 nd Floor Aayakar Bhavan M.K. Road Mumbai 400 020	Vs.	Dipti Nikhil Modi Unit No. 5, Shah Indl. Estate, Veera Desai Road, Andheri (W) Mumbai 400 058 PAN:- AABPM 8977 F
(Appellant)		(Respondent)

Assessee by : Shri J. P. Bairagra
Revenue by : Shri Love Kumar

Date of hearing : 17.03.2015
Date of Order : 25.03.2015

ORDER

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the Revenue against order dated 05.03.2012, passed by Ld. CIT(A)-16, Mumbai in relation to the penalty proceedings u/s 271(1)(c) for the A.Y. 2006-07. The revenue is mainly aggrieved by deletion of penalty of Rs.33,99,660/- which was levied on account of deemed dividend u/s 2(22)(e) of Rs.1,01,00,000/-.

2. Brief facts of the case are that, assessee is an individual who had received money from 3 companies, wherein she was major shareholder. The details of amount received and pattern of her shareholding were as under:-

<i>Sr. No.</i>	<i>Name of the Company</i>	<i>Amount Received</i>	<i>% of Shares</i>
1	<i>M/s. Exim Multi Media P. Ltd.</i>	<i>Rs.68,00,000</i>	<i>50</i>
2	<i>M/s. Edge Fine Print P. Ltd.</i>	<i>Rs,9,00,000</i>	<i>13.33</i>
3	<i>M/s. Shipping Times (I) P. Ltd.</i>	<i>Rs.24,00,000</i>	<i>50</i>
	<i>Total</i>	<i>Rs.1,01,00,000</i>	

In response to the show cause notice by the AO, as to why this amount should not be taxed as deemed dividend u/s 2(22)(e), the assessee submitted that these amounts have been received towards deposits for the premises used by these concerns for their business. The AO further require to furnish documentary evidences like lease agreements to justify the claim. However, no further evidences was furnished by the assessee. Accordingly, he treated the said amount as a loan/advance given by these companies to the assessee and treated it as deemed dividend u/s 2(22)(e).

3. In the first appeal, the Ld. CIT(A) confirmed the said action of the AO on the ground that all the conditions mentioned u/s 2(22)(e) are fulfilled and therefore, the provisions of deemed dividend are squarely applicable. In the second appeal also, the Tribunal has confirmed the said addition on the ground that the assessee's argument that she has received deposits in lieu of the premises given to these companies for their official purpose could not be substantiated. Therefore, order of the Ld. CIT(A) was up held.

4. In the penalty proceedings, the assessee submitted that assessee is the owner of immovable properties which has been let out/ given to the various companies for their office purpose. In lieu of that she had

received refundable deposits from these 3 concerns in which she was a shareholder. To substantiate the said claim interenal payment vouchers issued by the bank was also furnished, which clearly stated that these were in the form of deposits and not loans. Such a deposit cannot be treated as loan or advance within the ambit of section 2(22)(e). However, the assessing officer reiterated the same finding as was given in the quantum proceedings and held that since this issue has been confirmed by the Tribunal therefore, penalty is leviable. He also held that the assessee had not furnished proper particulars of income and assessee's claim have been held to be incorrect. After referring to catena of case laws he levied the penalty of Rs.33,99,660/-.

5. Before the Ld. CIT(A), the assessee gave detail submissions along with the evidence of bank payment voucher which was issued by the bank for the deposits received by the assessee. It was also pointed out that in the quantum proceedings, this primary evidence which substantiates the assessee's claim was not considered at all. The assessee has even filed Miscellaneous Application before the Tribunal to highlight this fact that these evidences were filed and referred before the Tribunal but has not been dealt upon and therefore, wrong finding of fact has been arrived. However, the Tribunal has dismissed the assessee's application on the ground that it is beyond the scope of section 254(2). It was further submitted that, not every amount received by the shareholder on account of the business dealing can be treated as loan or advance within the purview of section 2(22)(e). The security deposits received by these companies was for the use of the premises belonging to the assessee and such a security deposit is nothing but received during the course of normal business transaction in lieu of

usage of the premises for office and business purpose. In support, various decisions were also relied upon. Further the assessee's explanation before the AO in penalty proceedings has not been found to be false or unsubstantiated. Therefore, no penalty can be levied for furnishing of inaccurate particulars of income.

6. The Ld. CIT(A) deleted the penalty after detailed discussion and considering the entire material placed on record and the explanation filed by the assessee. He noted that the assessee has given complete details of refundable deposits for the use of the property given on rent and assessee also has furnished internal bank vouchers made by these concerns which clearly stated that the payment was towards deposits and not any advance or loan. This fact has not been taken into cognizance either by the CIT(A) or by the Tribunal even though they were placed before them. He also took note of the fact that these properties were not let out in the earlier years and only this year the property was given to these companies. Further the appeal u/s 260A has been filed before the Hon'ble Bombay High Court against the order of the Tribunal and the same has been admitted by the Hon'ble High Court on substantial question of law. The property in questions were commercial properties which were given to the 3 concerns for their office purpose. Therefore, any deposits received in lieu is nothing but for the letting of the properties. After referring to the decision of Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products P. Ltd. reported in (2010) 322 TTR 158, he deleted the penalty.

7. Before us, the Ld. DR strongly relied upon the order of the AO and the finding given in the quantum proceedings and submitted that it could not be established by the assessee during the course of the

quantum proceedings that the amount received by the assessee from the three companies was not in the form of loan or advance. Once, the Tribunal has given a category finding of fact, then penalty has rightly being levied by the AO.

8. On the other hand, learned counsel, Shri J. P. Baigara, submitted that the assessee was the owner of various properties which were given to the three companies for the usage of their business purpose. The assessee has not received any rent from these 3 companies. However, in lieu of letting out the properties, the assessee has received refundable security deposits from these companies. This is evident from the internal bank payment vouchers of these companies that they were in the nature of deposits. This evidence itself goes to show that assessee had not received any loan or advance as stipulated u/s 2(22)(e). This vital evidence which was filed before AO as well as before the appellate authorities has not been considered at all. The assessee's explanation in this regard has not been rebutted by the department in the penalty proceedings. Thus, the finding of fact as recorded by the Ld. CIT(A) and the law relating to levy of penalty u/s 271(1)(c) as discussed by him should be confirmed.

9. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material placed on record. It is an undisputed fact that assessee is major shareholder in M/s. Exim Multi Media P. Ltd.; M/s. Edge Fine Print P. Ltd. and M/s. Shipping Times (I) Pvt. Ltd. From these companies, the assessee has received money for sums aggregating Rs.1,01,00,000/- which has been contended to be in the form of refundable security deposits for letting the properties owned by the assessee to these companies for their business purpose. List of

properties owned by the assessee and given for use to these company were filed before the authorities during the quantum proceedings. Along with these details, the assessee had also filed internal bank payment voucher by these companies which show that amount has been given as "deposit" for the use of the property. These bank vouchers mentions the cheque number, name of the assessee, the amount of deposits given and the detail of the property. All these evidences though filed in the course of the quantum proceedings, have not been taken into cognizance by any of the appellate authorities. It has been brought to our notice by the learned counsel that, assessee has not received any rent from these companies, instead she had received only security deposits. In light of these facts, it cannot be conclusively held that the amounts given by these companies are in the form of loan or advance. This fact is further corroborated by the fact that, neither there is any entry of loan in the books of the assessee nor in the books of these companies. How such an amount received by the assessee is considered in the nature of loan is not borne out from the records. Be it that as may be, it is well settled proposition of law that the finding given in the quantum proceedings are quite relevant and have a provative value, but such a finding alone may not justify the imposition of penalty, because the considerations that arise in the penalty proceedings are separate and distinct from those in the assessment proceedings. Even though matter has been concluded in the quantum assessment proceedings, then also, they are not conclusive so far as penalty proceedings are concerned. The matter in the penalty proceedings has to be examined afresh from the angle whether the assessee is guilty of concealment of income or furnishing of inaccurate particulars of income.

The assessee may adduce fresh evidence in the penalty proceedings to establish that the material and relevant facts goes to prove the bona fide of the claim or take a different plea upon the same existing material that there is no concealment of income or furnishing of inaccurate particulars. The degree of proof necessary under the Explanation-1 to section 271(1)(c) can be discharged by the assessee by pointing out the factors and the material in his favour, because explanation merely raises a rebuttal presumption to which assessee can always discharge his onus by pointing out the factors relating to pre-ponderance of probability. Here in this case, the assessee's explanation that the money received from these companies were in the nature of refundable security deposits received by the assessee in lieu of letting of the properties owned by her has not been found to be false and in fact has been substantiated by the evidence in the form of internal bank vouchers and the entries in the books of account of the assessee as well as of the companies. The revenue has no material to rebut such an evidence or that the assessee's explanation is false based on material on record. The assessee's onus in the penalty proceedings stands fully discharged. Once, it has been shown that the amount has been received not as loan but as deposits, the deeming fiction of 2(22)(e) cannot be stretched to hold that the payment made by a company to a shareholder by way of deposit in lieu of usage of property for its business purpose is in the nature of loan. It is a trite law that the deeming fiction has to be strictly construed and such legal fiction cannot be extended for any kind of payment by a company to its shareholder. Thus, on the facts and circumstances of the case, we find that the reasons recorded by the Ld. CIT(A) for deleting the penalty is legally and factually correct and

accordingly the same is affirmed. Thus, the penalty levied by the AO has rightly been deleted and the ground raised by the Revenue stands dismissed.

10. In the result, the appeal filed by the **Revenue is dismissed.**

Order pronounced in the open court on this 25th day of March, 2015.

Sd/-
(B. R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai, Dated: 25.03.2015

*Srivastava

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR "D" Bench

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.