

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi , Judicial Member**

ITA No. 8819/Mum/2011
(Assessment Year: 2008-09)

M/s. Om Siddivinayak Creations Pvt. Ltd. 6 th Floor, Gazebo House Plot No. 52, Gulmohar Road Vile Parle (W), Mumbai 400049 PAN – AAACO7488F	Income Tax Officer-8(2)-4 Room No. 213/A, 2 nd Floor Vs. Aayakar Bhavan, M.K. Road Mumbai 400020
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Appellant

Respondent

ITA No. 55/Mum/2012
(Assessment Year: 2008-09)

Income Tax Officer-8(2)-4 Room No. 213/A, 2 nd Floor Aayakar Bhavan, M.K. Road Mumbai 400020	M/s. Om Siddivinayak Creations Pvt. Ltd. Vs. 6 th Floor, Gazebo House Plot No. 52, Gulmohar Road Vile Parle (W), Mumbai 400049 PAN – AAACO7488F
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Appellant

Respondent

Appellant by: Shri Vipual J. Shah
Respondent by: Shri Premanand J.

Date of Hearing: 18.01.2017
Date of Pronouncement: 20.01.2017

ORDER

Per Bench

These are cross appeals, by the assessee and Revenue directed against the order of the CIT(A)-17, Mumbai dated 31.10.2011 for A.Y. 2008-09.

2. The facts of the case, briefly stated, are as under: -

2.1 The assessee, a company engaged in business of film making and film financing in the form of loans, filed its return of income for A.Y. 2008-09 on 03.10.2008 declaring total income of ₹1,21,421/-; comprising loss of

₹27,06,657/- under the head 'Profit and Gains from Business and Profession' which was set off against short term capital gains (STCG) of ₹28,28,078/- on sale of property. The case was taken up for scrutiny and the assessment was completed under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 10.12.2011, wherein the income of the assessee was determined at ₹61,29,100/- in view of the following additions/disallowances: -

(i) Disallowance of interest charges	₹ 5,67,403/-
(ii) Disallowance of loss on film finance	₹ 6,38,615/-
(iii) Disallowance of claim of bad debts written off	₹12,56,664/-
(iv) Addition on account of deemed dividend under section 2(22)(e)	₹29,78,075/-

Apart from this short term capital gains on sale of property was assessed at Nil.

2.2 Aggrieved by the order of assessment dated 10.12.2010 for A.Y. 2008-09, the assessee preferred an appeal before the CIT(A)-17, Mumbai, who disposed off the appeal vide the impugned order dated 31.10.2011 allowing the assessee partial relief.

3. Revenue and the assessee, being aggrieved by the order of the CIT(A)-17, Mumbai dated 31.10.2011, have preferred cross appeals which will be disposed off in seriatum hereunder: -

4. **Assessee's appeal in ITA No. 8819/Mum/2011 for A.Y. 2008-09**

4.1 In this appeal the assessee has raised the following grounds: -

- "1. The learned CIT has erred in confirming the disallowance of Rs.638615/- as a business Loss.*
- 2. The appellant craves permission to add or amend or withdraw any of the ground or grounds of appeal at the time of hearing.*

4.2 The learned A.R. of the assessee was heard in support of the grounds raised and reiterated the submissions put forth before the learned CIT(A) as recorded in paras 5.1 and 5.2 of the impugned order. It is prayed that the disallowance of business loss of ₹6,28,615/- be deleted.

4.3 Per contra, the learned D.R. for Revenue placed strong reliance on the findings rendered in the order of the AO/learned CIT(A). It is contended

that both before the authorities below and also before the Tribunal, the assessee has failed to bring on record any material/documentary evidence to substantiate the business loss claimed and therefore the assessee's appeal on this issue is liable to be dismissed.

4.4.1 We have heard the rival contentions and perused and carefully considered the material on record. From an appreciation of the facts on record, it is seen that in the course of assessment proceedings, the AO observed that the assessee had claimed business loss of ₹6,65,305/- from financing four or five films. On examination of the details filed by the assessee in this regard, the Assessing Officer (AO) observed that the details filed constituted of only a film-wise statement in which all payments were made in cash and receipts from distribution were also received in cash. The AO also noticed that except for one film named 'Badla', which was the assessee's home production suffering a loss of ₹26,690/-, all other films were found to be produced by 'Mayura Films' as per Censor Board certifications filed. In this factual matrix, the AO was of the view that except for the loss incurred in the home production 'Badala', the losses on film finance claimed in respect of other films, apart from expenses, etc. not being established with any material evidence the losses thereof amounting to ₹6,38,615/- are not allowable as business loss. On appeal, the learned CIT(A) held that in the absence of documentary evidences to substantiate the assessee's claim in respect of the above loss on financing of films, the loss claimed cannot be allowed. In the factual matrix of the case, as discussed above, we are inclined to agree with the conclusions of the authorities below since even before us the assessee except for raising this grounds has failed to file any documentary evidence to establish the claim of losses incurred in financing of the films 'Jungle Love', 'Dudhwali' and 'Autowali' amounting to ₹6,38,615/-. Finding no reason to interfere with the finding of the learned CIT(A) on this issue, we uphold the same and consequently dismiss grounds 1 and 2 raised by the assessee.

5. In the result, assessee's appeal is dismissed.

6. Revenue's appeal in ITA No. 55/Mum/2012 for A.Y. v2008-09

6.1 In this appeal, Revenue has raised the following grounds: -

"1. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs.33,95,000/- made by the A.O. u/s 2(22)(e) of the IT Act 1961, without considering the fact that the provisions of Sec 2(22)(e) are clearly applicable in this case.

2. On the facts and circumstances of the case and in law, the Ld CIT(A) has failed to appreciate the CBDT's circular No 495 dated 22.09.1987, wherein the provisions of section 2(22)(e) have been explained as under:

"The new provision would, therefore, be applicable in a case where a shareholder has 10 percent or more of the equity capital. Further deemed dividend would be taxed in the hands of a concern where all the following conditions are satisfied.

(i) Where the company makes the payment by way of loans or advances to a concern

(ii) Where a member or a partner of the concern holds 10 per cent of the voting power in the company; and

(iii) Where the member or partner of the concern is also beneficially entitled to 20 per cent of the income of such concern.

With a view to avoid the hardship in cases where advances or loans have already been given, the new provisions have been made applicable only in cases where loans or advances are given after 31st May 1987. These amendments will apply in relation to Assessment Year 1988-89 and subsequent years."

3. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the disallowance of bad debts of Rs. 12,56,664/- without appreciating the facts of the case.

4. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the disallowance of interest of Rs. 10,4,873/- without appreciating the facts of the case.

5. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.

6. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

7. Ground Nos. 1 and 2 – Deemed Dividend under section 2(22)(e)

7.1 In these grounds (supra), the Revenue has challenged the impugned order of the learned CIT(A) in deleting the addition made on account of deemed dividend under section 2(22)(e) OF THE Act by the AO, as the said

provisions are attracted in the case on hand. The learned D.R. placed reliance on the grounds raised and the order of the AO on this issue.

7.2 Per contra, the learned A.R. of the assessee contended that there was no reason to interfere with the impugned order of the learned CIT(A) on this issue of deemed dividend under section 2(22)(e) of the Act, as the same is covered in favour of the assessee by the decision of the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2006-07 in ITA No. 3852/Mum/2010 dated 20.05.2011. It is prayed that, since the learned CIT(A) has rightly followed the aforesaid order in the assessee's own case for A.Y. 2006-07 (supra), Revenue's appeal on this issue be dismissed.

7.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. On a careful perusal of the order of the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2006-07 in ITA No. 3852/Mum/2010 dated 20.05.2011, we find that on similar facts the Coordinate Bench in the aforesaid order for A.Y. 2006-07 (cited supra) has deleted the addition made by the AO on account of deemed dividend under section 2(22)(e) of the Act holding under at paras 7 to 9 thereof: -

“7. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the facts are not in dispute inasmuch as it is also not in dispute that the assessee-company is neither share holder nor the beneficial share holder in the company namely M/s Gazebo Developers Pvt.Ltd. In ACIT vs. Bhaumik Colour P. Ltd. [2009] 118 ITD 1 (MUM.)(SB), it has been held by the Special Bench vide para -41, appearing at page 27, of the report as under:

“On the first question: Deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of a person other than a shareholder.

On the second question: The expression ‘shareholder’ referred to in section 2(22)(e) refers to both a registered shareholder and beneficial shareholder. If a person is registered shareholder but not the beneficial shareholder then the provisions of section 2(22)(e) will not apply. Similarly if a person is a beneficial shareholder but not a registered

shareholder then also the provisions of section 2(22)(e) will not apply.”

8. The Hon'ble Jurisdictional High Court in CIT, Vs Universal Medicare Pvt Ltd (2010) 324 ITR 263 (Bom) has held that “Even assuming that it was a dividend, it would have to be taxed not in the hands of the assessee but in the hands of the shareholder”.

9. In the absence of any distinguishing feature brought on record by the learned D.R., we respectfully following the decision of the Special Bench of the Tribunal (supra) and the decision of the Hon'ble Bombay High Court (supra) hold that the provisions of section 2(22)(e) are not applicable in the case of the assessee and accordingly we are inclined to uphold the finding of the learned Commissioner of Income Tax (A) in deleting the addition made by the AO. The grounds taken by the Revenue are, therefore, rejected.”

7.3.2 Respectfully following the ratio of the decisions of the Hon'ble Bombay High Court in the case of Universal Medicare Pvt. Ltd. (2010) 324 ITR 263 (Bom); of the Special Bench of the ITAT Mumbai in the case of Bhaumik Colour P. Ltd. (2009) 118 ITD 1 (Mum) (SB) and the decision of the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2006-07, we hold that the provisions of section 2(22)(e) of the Act are not applicable in the case of the assessee and accordingly uphold the finding of the learned CIT(A) in deleting the addition made by the AO under section 2(22)(e) of the Act. Consequently grounds 1 and 2 raised by Revenue are rejected.

8. **Ground No. 3 – Disallowance of Bad Debts – ₹12,56,664/-**

8.1 In this ground, Revenue assails the order of learned CIT(A) deleting the disallowance of bad debts amounting to ₹12,56,664/-. The learned D.R. for Revenue was heard and placed strong reliance on the finding rendered by the AO on this issue.

8.2 Per contra, the learned A.R. of the assessee submitted that there was no error in the order of the learned CIT(A) in allowing the assessee's claim for deduction on account of write off of bad debts standing in the name of the film 'Ganga Jamuna'. The learned A.R. reiterated the submissions put forth before the learned CIT(A) which are extracted at para 4.2 of the impugned order. According to the learned A.R. of the assessee, the learned CIT(A) has rightly observed that the assessee apart from being engaged in

the business of film making, was also as per the Article 22 of the Memorandum of Association (MOA) involved in lending and advancing money in the business of film financing which brings it within the purview of exception under section 36(2)(i) of the Act and it is in this context that moneys were advanced to M/s. Mayura Enterprises for making the Bhojpuri film 'Ganga Jamuna'. It is submitted that even alternatively, since these amounts have been advanced in the normal course of the assessee's business of film making the said loss is to be allowed under section 28/37 of the Act.

8.3 We have heard the rival contentions and perused and carefully considered the material on record. From an appreciation of the material on record, it is not disputed that the assessee company is admittedly engaged in the business of film making and financing of films. In the year under consideration, the AO noticed that the assessee had written off bad debts amounting to ₹12,56,666/- in respect of amounts advanced to Mayura Films for making the film 'Ganga Jamuna'. It is seen that the AO in spite of observing that the assessee was, inter alia, in the business of film financing held that the above claim for write off of bad debts was not allowable under section 36(i)(vii) r.w.s. 36(2)(i) of the Act for the reason that the same was not offered for taxation in the earlier years. We concur with the observation of the learned CIT(A) that the AO while relying on the provisions of section 36(2)(i) of the Act to deny the assessee's claim for write off of bad debts has failed to observe that sub clause (i) of section 36(2) of the Act provides an exception in the case of money lending business; which in our view, the assessee is engaged in as per Article 22 of its MOA and that is evidently so as per the facts on record. In this factual and legal matrix of the case as discussed above, we agree with the finding of the learned CIT(A) that "the sum written off represents money lent to Mayura Films for financing the film 'Ganga Jamuna' and therefore the claim of write off of the bad debts thereof is to be allowed under section 36(i)(vii) r.w.s. 36(2) of the Act. We hold and direct accordingly. Consequently, ground No. 3 raised by Revenue is dismissed.

9. Ground No. 4 – Disallowance of Interest (₹10,74,873/-)

9.1 In this ground, Revenue contends that the learned CIT(A) erred in disallowing the interest of ₹10,74,873/-. The learned D.R. for Revenue placed strong reliance on the finding of the AO in the order of assessment.

9.2 Per contra, the learned A.R. of the assessee contends that the learned CIT(A)'s order deleting the said disallowance of interest was in order, as the AO has admittedly not brought on record any material evidence to prove that either the interest paid or that the advances made were not for business purpose. It is submitted that all the details in this regard of advances made were placed on record by the assessee with reasons for not charging of interest in certain cases. It is prayed that in view of the above, Revenue's ground may be dismissed.

9.3 We have heard the rival contentions and perused and carefully considered the material on record. It is seen from a perusal of the order of assessment that the AO in the course of assessment proceedings had observed that the assessee's income from financing business had reduced to ₹4,72,475/-. The assessee's explanation for the decline of its income from financing business was found to be unacceptable by the AO and therefore proceeded to disallow the assessee's claim for interest on bank loan – ₹5,31,791/-, bank charges – ₹35,612/- and interest to others – ₹5,07,470/-. We find from a perusal of the material on record that, as observed by the learned CIT(A), the AO has not brought on record any evidence to prove that the interest paid by the assessee or advances made by assessee was not for business purposes. Neither before the authorities below or before us, has the Revenue been able to contravene the finding of the learned CIT(A) that the assessee has filed the complete details of advances made and basis of not charging interest. In this factual matrix of the case, as discussed above, we uphold the finding of the learned CIT(A) in deleting the disallowance of interest amounting to ₹10,74,873/-. Consequently, Ground No. 4 raised by the Revenue is dismissed.

10. **Ground Nos. 5 & 6B**

10.1 These grounds being general in nature and not being urged before us, no adjudication is called for thereon and these grounds are dismissed as infructuous.

11. In the result, Revenue's appeal for A.Y. 2008-09 is dismissed.

12. To sum up, both the cross appeals by the assessee and Revenue are dismissed.

Order pronounced in the open court on 20th January, 2017.

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 20th January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -17, Mumbai*
4. *The CIT - 8, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.