

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "G",
MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI T.R.SOOD (A.M)

ITA NO.4448/MUM/10(A.Y. 2006-07)

The DCIT 2(3),
Room No.555, Aaykar Bhavan,
MK Road, Mumbai – 20.
(Appellant)

M/s. Tata Investment
Corporation Ltd.,
Vs. Bombay House, 24, Homi Mody
Street, Fort, Mumbai – 400 001
PAN: AAAC 4120F
(Respondent)

Appellant by : Shri Pavan Ved
Respondent by : Shri Burzis S. Taraporwala

ORDER

PER N.V.VASUDEVAN, J.M,

This is an appeal by the Revenue against the order dated 8.3.2010 of CIT(A)-6, Mumbai, relating to AY 06-07. The grounds of appeal of the revenue read as follows:

“On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. The order of the CIT(A) is opposed to law and facts of the case.
2. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 14,33,000/- being excess dividend recovered by the assessee during the year which was not refunded to the rightful owners.
3. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the Assessing Officer restored.”

2. The Assessee is a Non-Banking Finance Company as defined by the Reserve Bank of India, under the category “investment company”. In the course of its business, the Assessee sold shares which it held as

investments. The transfer of shares had taken place in the earlier assessment years. The transfer of names of the transferee was not recorded in the register of members of the company whose shares were transferred by the Assessee. Therefore dividend declared by the companies on those shares was paid to the Assessee. The Assessee received a sum of Rs.14.33 lakhs during the previous year in this regard. The same was shown as part of sundry creditors under the heading "Excess Dividend received refundable" in the balance sheet as on 31.3.2006. According to the AO, since the excess dividend recovered has not been refundable during the previous year relevant to Assessment year under consideration, the amount was to be treated as income of the Assessee for the year. The AO in coming to the above conclusion relied on the decision of the Hon'ble Supreme Court in the case of M/S.Chowranghee Sales Bureau Ltd. Vs. CIT 87 ITR 542 (SC).

3. Before CIT(A), the Assessee submitted that the dividends were received on shares which were already sold by the assessee and were no longer show as investment in the accounts of the assessee. The Assessee therefore submitted that the said dividend received by it does not constitute its income as the assessee is neither the actual nor the beneficial owner of the shares on which the dividend was received. The Assessee pointed out that dividend so received is subsequently refunded to the correct owner of the shares on being given proof of ownership. Also, in the event that the excess dividend is not claimed by the correct owner upto a period of five from the end of the financial year in which the dividend is received, the assessee credits the said unclaimed dividend to miscellaneous income and offers the same to tax. The Assessee pointed out that the excess dividend as on 31 March 2006 was Rs. 14.33 lakhs, which pertained to the Assessment Year 2006-07 and for previous assessment years. The Assessee pointed out that the accounting policy of the assessee has been accepted by the Revenue in all earlier years

and this addition of Rs.14.33 lakhs has been made by the revenue only for the first time in the present assessment year. The Assessee also distinguished the decision of the Hon'ble Supreme Court in the case of M/s. Chowringhee Sales Bureau P. Ltd. vs. Commissioner of Income Tax (87 ITR 542). The Assessee pointed out that in the aforesaid case the facts were that the Assessee, a private company, was a dealer in furniture, who also acted as an auctioneer. In respect of the sales effected by it as an auctioneer, the appellant realized commission and Sales Tax. The amount of sales tax realized was credited separately in its account books under the head "Sales tax collection account." The assessee did not pay the amount of Sales Tax to the actual owner of the goods, nor did it deposit the amount realized by it as Sales Tax in the State Exchequer, because it took the position that the statutory provision creating that liability upon it was not valid. The Assessee also did not even refund the Sales Tax to the persons from whom it had been collected. In the cash memos issued by the assessee to the purchasers in the auction sales, the assessee was shown as the seller. On the above facts, the Hon'ble Supreme Court held that:

- a) An Auction Sale would have to be considered to be a sale for the purpose of the Sale of goods Act.
- b) An Auctioneer, who carries on the business of selling goods and who has in the customary course of business authority to sell goods belonging to the principal, should be included within the definition of the word 'dealer'.
- c) As the amount of Sales Tax was received by the appellant in its character as an Auctioneer, the amount, in the view of the Supreme Court, should be held to form part of its trading or business receipt.
- d) It is the true nature and quality of the receipt and not the head under which it is entered in the account books as would prove decisive.

The Assessee pointed out that in its case, it has received dividend on shares which are no longer part of its investment portfolio. The dividends received by the Assessee do not therefore constitute part of its income and, therefore,

the said dividends constitute a liability in the hands of the assessee, as the same are held by the assessee for and on behalf of the rightful claimants of the dividend. In any event, if the dividend is not claimed within a period of five years from the end of the year in which it is received, the appellant itself has offered the same as income and paid tax on the said dividends. The position has been consistently followed by the appellant and the same has been accepted by the revenue in all past assessments. The assessee further relied on the judgment of the Punjab & Haryana High Court in the case of Commissioner of Income-tax v Leader Valves Ltd., (295 ITR 273) where the Court held that keeping in view the principles of consistency, the revenue could not be permitted to raise an issue in isolation only for one year in the case of one assessee while accepting the findings on the same issue in the case of other assessees and for other years in the case of the assessee.

4. The CIT(A) accepted the stand of the Assessee and deleted the addition made by the AO, observing as follows:

“7.3 I have considered the facts of the issue as well as submissions filed by the AR and find merit in them. It is an admitted fact that the dividend has been received in respect of shares which are no longer part of appellant’s investment portfolio. Thus, appellant is actually holding the said dividend amount in trust of the rightful owners and the same actually represents a liability of the appellant. There is also merit in the submissions of the AR that in any case, after an expiry of a period of five years, the said amount is voluntarily offered for taxation, if not claimed by the rightful owner. It is also noted that this policy has been consistently been followed by the appellant and accepted by the department in the past and that even on the principle of consistency, this addition is not warranted. This ground is therefore allowed.”

5. Aggrieved by the order of the CIT(A), the revenue has preferred the present appeal before the Tribunal. We have heard the rival submissions.

The learned D.R. submitted that the Assessee did not produce any evidence before the AO to show that the sum of Rs.14.33 lakhs was in fact dividend on shares which the Assessee had already transferred. He also submitted that the claim of the Assessee that the shares on which the dividend in question were received by the Assessee, were held as Investment has not been examined. According to him, the claim of the Assessee without proof of the above basic facts should not have been accepted by the CIT(A). In this regard, it was also submitted by the learned D.R. that even if AO had not raised dispute on the above aspects, it was the duty of the CIT(A) to have examined the same. It was further submitted by him that the principle of consistency which was one of the basis on which the CIT(A) deleted the addition made by the AO, would not be applicable because the principle of resjudicata is not applicable in Income Tax proceedings. It was further submitted that dividend received by the Assessee was part of trading receipts though assessed under the head "Income from Other sources" u/s.56 of the Income Tax Act, 1961 (the Act). He placed strong reliance on the decision of the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. (supra).

6. The learned counsel for the Assessee reiterated the stand of the Assessee as was put forth before CIT(A) and further clarified that the shares in respect of which dividend were received by the Assessee formed part of the investment portfolio of the Assessee and not stock-in-trade of the Assessee. Further reliance was placed on the decision of the ITAT Mumbai in the case of SSKI Investor Services (P) Ltd. Vs. DCIT (2009) Vol. 34 SOT 412(Mum) wherein on identical facts, the Tribunal held that u/s.115-O of the Act, tax is levied on distributed profits of domestic companies and therefore already suffers tax in the hands of the company paying dividend. The receipt of dividend by an Assessee who has already sold the shares cannot be termed

as dividend in his hands because he is no longer the owner of shares. The character of the income would change in the hands of such Assessee but the fact would remain that the dividend has already suffered tax and therefore cannot be again taxed in the hands of the Assessee who sold the shares but still receives dividend on shares transferred by him.

7. We have considered the rival submissions. At the outset we have to reject the argument of the learned D.R. that the character of the sum in dispute has not been established by the Assessee to be a dividend paid on shares which it had transferred and that the dividends have to be refunded to the rightful owners. In this regard, neither the AO nor the CIT(A) disputed facts regarding the claim of the assessee in this regard. It is not open to the revenue for the first time in an appeal before the tribunal to raise such an issue. It was submitted by the learned D.R. that the fact that the A.O made the impugned addition by itself shows that he had disputed the claim of the assessee. In this regard we notice that the A.O never called upon the assessee to furnish details in this regard. Even before CIT(A) the A.O has not raised any issues on this aspect. The case of the A.O before tribunal proceeds on the footing that it is only when refund of dividend is made to the rightful owner of the dividend, can the assessee say that the receipt is not its income. We therefore do not find any merit in the argument raised by the learned D.R. in this regard before us and we proceed to examine the issue on the premise that the claim of the assessee that the receipts in question were dividend which are lawfully payable to the transferees of shares by the assessee is correct.

8. The law is well settled that all receipts are not income. Only those receipts which are in the character of income can be assessed to tax. The definition of 'Income' as given in the Act, u/s.2(24) is an inclusive definition. Anything which can properly be described as income, is taxable under the

Act unless expressly exempted. The expression "Income" has to be understood in its natural meaning. Its natural meaning embraces any profit or gain, which is actually received. The idea behind providing an inclusive definition in section 2(24) is not to limit its meaning but to widen its net. The charging section viz., Section-4 of the Act, refers to the charge of income tax being on the total income of the previous year of every person. Section 5 defines scope of total income and it talks of income from whatever source derived which is received or deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India. The income bears its quality as income only if it is received by the Assessee, or it has accrued or has arisen to the Assessee, or at least is fictionally deemed to be received by or is deemed to have accrued or arisen to him. If not in fact received, the Assessee should at least be entitled to receive it. To call something income, without there being an actual receipt, there must at least be a debt owned by a third party to the Assessee. It would be equally true to say that even when a person receives something, the same will assume the character of "Income" in the hands of the recipient only when he has a legal right to the sum received. Otherwise, the recipient would only be holding the money so received in trust for the lawful owner of the money. The Assessee has received dividend on shares which it had already transferred and the right to receive dividend vests with the transferee. Nevertheless, the Assessee received the sums in question because it was shown as the registered owner of the shares in the Register of Members of the Company. Sec.72 of The Indian Contract Act, 1872 lays down a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. It is thus clear that it is only when there is a right to receive income, income can be said to have accrued. Without legally enforceable right there can be no accrual of income. we are of the view that the assessee has no lawful right to the receipt in question nor has it claimed such a right.

in such circumstances, the receipt will not assume the character of income in the hands of the assessee. On this ground itself, the appeal of the revenue deserves to be dismissed.

9. We also find that the assessee has been following consistently the method of accounting whereby the dividends received by the assessee which are to be refunded to the rightful owner, if the same is not claimed for a period of 5 years from the date of receipt of the dividend by the assessee, is treated as income and offered to tax by the assessee. This method of accounting has been accepted by the revenue. In such circumstances we failed to see as to how the revenue will be prejudiced. In our view the method of accounting adopted by the assessee is very reasonable. In our view the CIT(A) was, therefore, justified in deleting the addition made by the AO.

10. With regard to the decision of the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. (supra) we are of the view that the said decision is not applicable to the facts of the present case. In the said case the assessee collected Sales Tax from the customers and took a stand that the same is not payable to the State Exchequer. In the present case the assessee has always maintained that the dividend received by it which were lawfully payable to the transferee of shares were not its money. In such circumstances we are of the view that the decision in the case of Chowranghee Sales Bureau Ltd. (supra) will not be applicable. Further the dividends were received on shares which were held as investments. At the time of receipt of the dividends, the shares did not form part of the investment portfolio of the assessee and, therefore, it cannot be said that it was received by the assessee in its character as an investor. We, therefore,

find no infirmity in the order of the CIT(A). Consequently, the appeal of the revenue is dismissed.

11. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open court on the 15th day of July, 2011.

Sd/-

Sd/-

(T.R.SOOD)
ACCOUNTANT MEMBER

(N.V.VASUDEVAN)
JUDICIAL MEMBER

Mumbai, Dated. 15th July.2011

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R”H” Bench.

(True copy)

By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.

	Details	Date	Initials	Designation
1	Draft dictated on	28/6/11		Sr.PS/PS
2	Draft Placed before author	29/6/11		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			