

I.T.O. Ward -3(5), Nagpur vs Shri Mukundrao Govindrao Mankar, Katol on 28 June, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA no. 223/Nag./2015
(Assessment Year : 2010-11)

Income Tax Officer

Ward-3(5), Nagpur

..... Appellant

v/s

Shri Mukundrao Govindrao Mankar
At & Post Digra, Tehsil-Katol

..... Respondent

Dist. Nagpur 441 302
PAN - BNXP3931R

Assessee by : Shri K.P. Dewani
Revenue by : Shri A.R. Ninawe

Date of Hearing - 22.06.2017

Date of Order - 28.06.2017

ORDER

PER AMARJIT SINGH, J.M.

The present appeal preferred by the Revenue is directed against the the impugned order dated 14th April 2015, passed by the learned Commissioner (Appeals)-2, Nagpur, for the assessment year 2010-11, on the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of ` 61,74,880 in respect of loan taken by the assessee from M/s. Landscaper Realtors Pvt. Ltd.

2 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not appreciating that the facts and Shri Mukundrao Govindrao Mankar circumstances of the case at hand are difference from those of the case law relied upon i.e., Chandrakant H. Shah v/s ITO, 121 TTJ 145 (Mum.) (2009)."

2. Brief facts of the case are the assessee is an Ex-MLA and is having agricultural income as well as

income from pension. For the year under assessment, the assessee filed his return of income on 7th September 2011, declaring total income to the tune of ` 1,15,260. The Assessing Officer noted that the assessee acquired a residential flat at Adarsh Co-operative Housing Society and that the major source of payment with regard to the said investment was borrowings from one M/s. Landscaper Realtors Pvt. Ltd. (LRPL) and from his son. The Assessing Officer further noted that the total payment made by the assessee to Adarsh Co-operative Housing Society, were to the tune of ` 76,49,461 for the period from 22nd July 2009 to 21st August 2010 in lieu of allotment of the said flat. The assessee furnished various details including copy of account of the said LRPL, source of payment made to Adarsh Co-operative Housing Society, loan agreements with LRPL, security provided for the said loan, interest paid to LRPL, etc. The Assessing Officer further carried out enquiries by way of issuing notice under section 131 to LRPL with certain directions contained in the said notice. The LRPL complied to the said directions of the Assessing Officer and furnished various details including copy of confirmation of the assessee's a/c, its income tax return, copy of balance sheet, rate Shri Mukundrao Govindrao Mankar of interest charged and copy of loan agreement and explained that its relation with the assessee was that of lender and borrower. The Assessing Officer considered the various submissions of the assessee and also examined the evidences that he had collected during the course of assessment proceedings and came to the conclusion that unsecured loan obtained by the appellant from LRPL is without entering into a proper agreement and without a stamp paper and that no repayment agreement or terms and conditions for the repayment have been drawn or prepared and hence concluded that the assessee was not in a position to repay the said huge loan in view of its limited earnings. The Assessing Officer disagreed with the submissions of the assessee that the financier will collect the first installment of principal and interest after one year from the date on which the said flat is given on rent. He came to the conclusion that the said unsecured loan taken by the assessee from LRPL is nothing but an amount passed onto the assessee without consideration which is not liable for repayment and the characteristic features of loan are absent and that, therefore, the said amount was liable to be taxed as the income of the assessee under the provisions of section 56(2)(vi) / 56(2)(vii) of the Act. The Assessing Officer, therefore, added an amount of ` 61,74,880 to the income of the assessee. Being aggrieved by the order so passed Shri Mukundrao Govindrao Mankar by the Assessing Officer, the assessee filed appeal before the first appellate authority.

3. The learned Commissioner (Appeals) confirmed the assessment order by observing as follows:-

"5. I have carefully considered the facts of the case and the written submissions of the appellant. I find substantial force in the submission made by the appellant. The Ld. AO has added the said amount by invoking the provisions of section 56(2)(vii)(a) in view of the following:-

- a) No property was mortgaged towards security of the loan.
- b) No security was provided against the loan.
- c) No proper legal document was created for obtaining loan.

d) No legal binding agreement was executed.

5.1 Thus it is seen that it is the contention of the Ld. AO that the said transaction does not have the characteristic features of a loan and lacks the features, which we generally associate with the term loan. The term loan' has been examined in detail in various Court's ruling. As per HM Revenue and Customs (accessed at <http://www.hmrc.gov.uk/manuals/cfmmanual/cfm30140.htm>) the key definition of a loan relationship is that it is a:

- money debt
- arising from a transaction for the lending of money.

As per the website; both elements have to be present for the arrangement to be a loan relationship and states that neither part of the definition is itself defined in the legislation, although loan is said to include 'any advance of money'. It further clarifies that a loan involves repayment and central to the idea of a Moan' is that it involves one person (the creditor) agreeing to lend money to another (the debtor) in consideration of promise to repay that sum, on demand or at some future point, or on condition of some event happening. It also states that a loan usually, but not necessarily involves the payment of interest or an interest-like return by the debtor and that the obligation to repay is central to the idea of a debt.

5.2 Thus the transaction of loan implies an agreement to repay the amount that is borrowed and is defined as 'a contract by Shri Mukundrao Govindrao Mankar which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows'. Thus clearly a loan involves an enforceable agreement between two parties, one of whom is the lender and the other the borrower and the latter receives the sum and promises to repay it by an equivalent amount at a future day with or without interest. It is not necessary that a loan has to be repaid along with interest. As a matter of fact no condition exists in law of contract that a loan can be given with interest only. Similarly it is not a requirement of law of contract that the loan agreement has to be necessarily in written. Also, with regard to the issue of repayment schedule not being specified, the same is not material to alter the nature of the transaction because the term of repayment could be altered/ extended/changed by mutual consent of both the parties.

5.3 It is important to note that several evidences have been brought on record by the appellant to establish that the said amount received by the appellant from LRPL is in the nature of loan and that the same is required to be repaid. The appellant has been showing the said amount received from LRPL as loan. The appellant had also filed a confirmation before the Ld. AO from the said LRPL during the course of assessment proceedings. The Ld. AO has also verified the said fact independently by issue of notice u/s 131 of the Act to LRPL. The nature of the transaction also becomes evident from the fact that LRPL has shown the said amount as loan in its books of account and in its balance sheet. In such circumstances it is evident that the said amounts received by the appellant during the year under consideration are in the nature of loan only.

5.4 During the course of assessment proceedings sufficient evidences have been brought on record by the appellant to conclusively establish the relationship of borrower and lender with the said

LRPL. The said LRPL has furnished various details before the Ld. AO including its balance sheet, copy of account, return of income etc. to conclusively establish that it has given a loan of the said amount to the appellant and it has duly reflected in its balance sheet as a loan. As clarified by the appellant and by LRPL, LRPL has also charged interest on the amount and amount of interest charged has also specified and duly confirmed by both the parties involved.

5.5 It is also important to note that LRPL has charged interest on the said amount and amount of interest charged has been offered to tax in its return of income. Thus while in the assessment of LRPL, the relationship of lender and borrower is being accepted and the interest income is being accepted and taxed, a contrary Shri Mukundrao Govindrao Mankar view cannot be taken in the case of the appellant. It is settled law that the Income tax authority having relied on one part of a transaction cannot reject the other part of the same transaction and take an entirely different view. Once having held that the said LRPL had advanced loans to the appellant and having charged interest in respect of the interest free loan given by the LRPL to the appellant, the department cannot now take a contrary view in the hands of the recipient of the loan and hold that the said amount is a gift in the hands of the recipient appellant. The department cannot approbate as well as reprobate. The maxim qui approbation reprobate (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens, which at its most basic level provides that a person taking advantage under an instrument that both grants a benefit, and imposes & burden, cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. He cannot, to use the words of Honyman, J. in *Smith v. Baker* (1878) LR 8 CP 350 at p. 357 v at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage'.

5.6 Thus in the given set of circumstances, it is evident that the said amount of money advanced by the LRPL to the appellant is in the nature of loan. On almost identical facts the Hon'ble Mumbai ITAT in the case of *Chandrakant H. Shah V/s. ITO 121 TTJ 145* (supra) has held that once amounts have been shown in the balance sheet as loan and also shown confirmation by the lenders that they were loan and not gifts, the same cannot be brought to tax u/s 56(2)(v) even if the said amount are not repaid and that the loan transaction ought to be considered u/s 68 only and not u/s 56(2)(v). It has been held therein that interest free loan without repayment stipulation obtained from sister concerns for purchase of flat from one of them - loans to be examined in context of s.68. It has been further held that if the requirement of section 68 stands approved the Ld. AO cannot then add the said amount u/s 56(2)(v) as there cannot be two provisions enabling addition in respect of the said transaction.

6. In the said case, the Assessing Officer from the perusal of the balance sheet for the year ended on 31-3-2005, noted that the assessee, an individual, had shown a sum of Rs. 54,70,000 as loans taken from the four concerns, namely, ND, UTC, NLL, and ME. The assessee filed confirmation letter of the lenders before the Assessing Officer who found that the parties/concerns from Shri Mukundrao Govindrao Mankar whom the assessee had taken loans, were builders by profession and were sister

concerns and that the assessee was also employed with one of the concerns, viz., ND as Site Supervisor, He also noted that the assessee had used the loans for purchase of a residential flat from the same builder. The Assessing Officer further found that the assessee was having total income for the year under consideration, of Rs. 2.62 lakhs, hence, repayment capacity of the assessee was very poor. Accordingly, the Assessing Officer formed an opinion that since the assessee was working with the group for several decades, those parties gave such a huge loan to the assessee without any security and interest as a mark of gratitude, irrespective of his repayment capacity and, therefore, in the absence of any obligation on the part of the assessee to repay the loans, the entire transaction was of the nature of gift which was given a colour of loan. The Assessing Officer, therefore, added a sum of Rs. 54,45,000 after giving a rebate of Rs. 25,000 to the income of the assessee as income chargeable to tax under section 56(2)(v). In the said set of facts, it has been held as under:

We are, however, unable to find any material being brought on record by the revenue to support these findings, hence, the orders of Revenue Authorities appear to be passed on assumptions and presumptions and, particularly, when apparently, there exist no provision in the section 56(2)(v) to treat loans, which may not be repaid, as income of the assessee..'

6.1 It has been further held as under:-

"11.1 Having stated so, this addition also puzzles us as to what would happen in the case of genuine loans given and taken in the normal course of commercial practice or on account of social considerations. To put it in other words, if a interest free loan cannot be added under section 68, then, such loan should be added as income of the recipient under section 56(2)(v) of the Act which also means that there would not be any difference between capital receipt/liability and revenue liability/receipt. This type of addition also leaves to a situation of having two provision for charging one type of income, i.e., the Legislature has provided two charging sections, i.e., sections 68 and 56(2)(v) which cannot be so as in that case the legislation would have made the provisions of section 56(2)(v) either of overriding nature by stating that "notwith-standing anything contained in section 68" or by providing for applicability of provisions of section 56(2)(v) in any other manner, in case provisions of section 68 could not be invoked. In this regard, we are further of the opinion that when a specific provision exist in law for particular thing, then, that thing is liable to be examined thereunder only and if that item cannot Shri Mukundrao Govindrao Mankar be taxed under that provision, then, that thing cannot be charged to tax under other provisions of the Act. For example, if an item falls under the head "Profits and gains of business or profession"

but if the same cannot be taxed thereunder for any reason, then, that cannot be taxed under any other head. Surprisingly, in present case, it is not that provisions of section 68 were not applicable at all, hence, the Assessing Officer invoked the provisions of section 56(2)(v). On the contrary, the Assessing Officer has made necessary enquiries in that regard and the Assessing Officer has not made addition under section 68 for the reason that all the requirements of that section, i.e., identity; creditworthiness and genuineness of transactions have been proved. Hence, in our view, a loan transaction has to be treated as a loan transaction only and it should be examined in the light of

provisions of section 68 and not under provisions of section 56(2)(v) of the Act and for this reason alone, this addition is liable to be deleted...

11.16 Thus, in view of above discussion, we hold that the said transaction meets all the requirements of general law which is only to be looked into while invoking provisions of section 56(2)(v) of the Act and, therefore, in our view it is a transaction having a consideration and, therefore, the same does not fall within the ambit of the provisions of section 56(2)(v) of the Act for this reason also.

11.17 Having held so now, we would like to deal with other contentions of the revenue. It was contended that there must be an agreement in writing which is not a requirement of law of contract as the agreement can be oral or in writing, hence, we reject this contention of the revenue. Similarly, a contention was raised that the repayments schedule was not prescribed and, however, in our opinion, this fact is not material so as to alter the nature of the transaction because the term of repayment can be expended by mutual consent of both the parties. The provisions of section 63 of the Indian Contract Act, 1872 also provide for notation of contract which reads as under:

"Every promisee may dispense with or may frame, whole or in part, the purpose of the promise made to him or may extend the time of such performance, or may accept in respect of it any satisfaction which he thinks fit."

11.18 Thus, we do not find any merit in the contention of the revenue, hence, we reject the same.

11.19 Another contention raised by the revenue was that the liability to repay never existed at > the time of receipt of the said Shri Mukundrao Govindrao Mankar sums and this fact was not proved by the assessee. In this regard, as stated earlier, that a contract can be oral as well and in such a situation, intention has to be gathered from the circumstantial evidences. In the present case, the intention to repay gets established by the fact that the assessee has shown it as a loan in the Balance Sheet and this fact has been further supported by the parties by submitting loan confirmation certificates during the course of the assessment proceedings. Therefore, we reject this contention of the revenue also.

11.20 Another contention raised by the revenue was that proof of repayment had been furnished subsequently and this being additional evidence, the matter should go back to the file of the Assessing Officer. In this regard, we have to state that as we have found that the transaction is with consideration and loan transactions, as such, are not chargeable under the provisions of section 56(2)(v) of the Act, hence, we do not find any necessity to send the matter back to the file of the Assessing Officer for this purpose. Thus, this contention of the revenue is a/so rejected...

14. In the end, we would like to emphasise on the fact that several commercial considerations prevail in the business world for entering into business transactions of various types and as observed by the Hon'ble Bombay High Court in the case of Keshub Mahindra (supra) if the revenue Authorities tax such transactions in this manner, then, the conduct of business would become impossible. It is also pertinent to mention here that 'o' per cent interest loan or interest free loan have been institutionalized where the manufacturing companies or marketing companies compensate the

financing companies who give money to the customers interest free to buy the products and these types of loan result into a vibrant economy benefiting all concerned and if the view taken by the Revenue Authorities is accepted then, a/I such transactions can be taxed as income under section 56(2)(v) of the Act which cannot be the intention of the legislature, hence, in our view, the interpretation of section 56(2)(v) made by the Revenue Authorities is not at a/I valid and justified. Accordingly, we hold that a transaction of loan can be without interest and a transaction of loan implies an agreement to repay the money i.e. borrowed which a/so gives reply to the revenue's query regarding existence of the obligation to repay the money at the time of taking of such loan.

15. Thus, in view of above discussion, we accept ground No, 3 of the assessee and direct the Assessing Officer to delete the addition in toto.

Shri Mukundrao Govindrao Mankar 6.2 The Hon'ble Jurisdictional High Court in the case of Mr. Chandrakant Shah Vs. CIT in ITA No. 3154 of 2009 dated 6th September, 2010 has upheld the order of Hon'ble ITAT.

6.3 Considering the above totality of facts it is evident that the amounts which have been shown in the balance sheet as loan and also confirmed by the lenders to be loan are not gift and cannot be brought to tax u/s 56(2)(v) of the Act even if the same remained unpaid. It is not a requirement of law or contract that the written agreement should be entered into on a stamp paper while taking a loan. Absence of repayment scheduled does not alter the fact that the amount taken by the appellant is in the nature of loan. The intention of the appellant has to be gathered from the circumstantial evidence and the intention to repay the loan is established by the fact that the said amount is shown as loan in the balance sheet of the appellant as well as of LRPL. It is also a fact that that all the requirements of section 68 i.e., identity; creditworthiness and genuineness of transactions stand established as confirmation letter from the said LRPL has been filed by the appellant. Considering the above totality of facts the addition made by the Ld. AO of Rs. 6174880/- is hereby deleted."

The assessee being aggrieved by the aforesaid order of the learned Commissioner (Appeals), is in further appeal before the Tribunal.

4. Before us, the learned Counsel for assessee, at the very outset, submitted that the issue in dispute in the present appeal is covered in favour of assessee by the decision of the Hon'ble Jurisdictional High Court in Mr. Chandrakant Shah, ITA No.3154 of 2009, vide order dated 6th September 2010. The learned Counsel submitted that the Financial statement of M/s. Landscaper Realtors Pvt. Ltd. clearly depict that it has advanced loan to assessee and amount given is shown receivable in Balance Sheet. He submitted that the interest receivable from Shri Mukundrao Govindrao Mankar assessee has been shown and assessed at the hands of M/s.

Landscaper Realtors Pvt. Ltd. There remains no scope for invocation of provision of section 56(2)(vi) / 56(2)(vii) at the hands of assessee.

The learned Counsel further submitted that the Assessing Officer has obtained information under section 131 of Act from M/s. Landscaper Realtors Pvt. Ltd., wherein the aforesaid company has

submitted the details of loan given by such company to assessee. The assessee has further submitted confirmation of loan and loan agreement before the Assessing Officer and as before the learned Commissioner (Appeals) and the same are placed in paper book at Page-24 to 29. The learned Counsel for assessee further submitted that on a bare perusal of provisions of section 56(2)(vi)/(vii) of Act would indicate that the aforesaid provisions are applicable when any money is received by an individual or HUF without consideration from the person other than relative. He submitted, the aforesaid provisions are inapplicable in respect to loan obtained in the normal course of contractual transaction between two parties. The learned Counsel further submitted that the Assessee has to repay the loan obtained for purchase of flat and the mode and manner of repayment is also placed on record of Assessing Officer and the learned Commissioner (Appeals) and same is placed in paper book Page-29. The assessee has also made part payment of amount payable to such company and the same Shri Mukundrao Govindrao Mankar is a transaction of loan on interest, hence, the addition made by the Assessing Officer was not justified. He further submitted that the amounts received by assessee having been shown as loan by assessee and same also confirmed by lenders as loan and not gift cannot be brought to tax under the provisions of section 56(2)(vi)/(vii) of the Act even if it is not repaid. The assessee has made part payment of amount payable to M/s. Landscaper Realtors Pvt. Ltd. in subsequent Financial Years as follows:-

F. Y.	Amount
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2013-14	` 3,00,000
2014-15	` 19,75,000
2015-16	` 5,00,000
2016-17	` 9,50,000

The learned Counsel for assessee in support of his contentions relied upon the following case laws:-

i) (2010) 3 ITR 398 (Mum.) Chandrakant H. Shah vs. ITO (P- 34)

ii) Bombay High Court judgment in ITA No.3154 of 2009, Mr. Chandrakant H. Shah, dated 06.09.2010

5. The learned Departmental Representative dutifully relied upon the order of the Assessing Officer.

6. We have heard the rival contentions and perused the material available on record. It is seen that assessee has received loan of ` Shri Mukundrao Govindrao Mankar 61,74,880 from M/s. Land Scrapper Realtors Pvt. Ltd. The aforesaid loan outstanding was verified by Assessing Officer from the said company and it was found that the same is reflected as amount receivable from assessee in balance sheet of the said company. The confirmation in respect to amount received by assessee as loan has been submitted in assessment proceedings and is placed in paper book before us. The loan obtained is also verifiable with reference to copy of loan agreement on record. The interest payable by assessee has been shown as income by the said company in its books of account. The transaction of loan cannot be subjected to tax under the provisions of section 56(1) (vii) of Income Tax Act 1961. The Hon'ble Jurisdictional High Court in case of CIT Vs. Shri Chandrakant Shah, in ITA No.

3154/2009 in judgment dated 6th September 2010 while considering the provisions of section 56(2)(v), has held as under:

"2. The question of law raised in the appeal revolves around deleting the additions made by the Assessing Officer under section 56(2)(v) of the Income Tax Act. The Tribunal has taken into account the facts and circumstances of the case and after appreciation thereof, recorded a finding of fact in paragraph No.14, which reads as under:

14. In the end, we would like to emphasise on the fact that several commercial considerations prevail in the business world for entering into business transactions of various types and as observed by the Hon'ble Bombay High Court in the case of Keshub Mahindra (supra) if the Revenue Authorities tax such transactions in this manner, then, the conduct of business would become impossible.

It is also pertinent to mention here that '0%' interest loan or interest free loan have been institutionalized where the Shri Mukundrao Govindrao Mankar manufacturing companies or marketing companies compensate the financing companies who give money to the customers interest free to buy the products and these types of loan result into a vibrant economy benefiting all concerned and if the view taken by the Revenue Authorities is accepted then, all such transactions can be taxed as income u/s 56(2)(v) of the Act which cannot be the intention of the legislature, hence, in our view, the interpretation of section 56(2)(v) made by the Revenue Authorities is not at all valid and justified. Accordingly, we hold that a transaction of loan can be without interest and a transaction of loan implies an agreement to repay the money i.e. borrowed which also gives reply to the Revenue's query regarding existence of the obligation to repay the money at the time of taking of such loan."

3. In the above view of the matter, it is difficult to find fault with the view taken by the Tribunal. The appeal is, therefore, dismissed for want of substantial question of law with no order as to costs."

7. The ratio laid down by the Hon'ble Jurisdictional High Court squarely applies to the facts in case of assessee. The learned Commissioner (Appeals) has followed the decision of the Tribunal in case of Shri Chandrakant Shah v/s ITO, 121 TTJ 145. The aforesaid decision has been upheld by the Hon'ble Jurisdictional High Court and is reproduced hereinabove. In view of above, we are of the view that the learned Commissioner (Appeals) has passed the order judiciously and correctly which is not required to be interfered with at this appellate stage. Accordingly, this issue is decided against the Revenue.

The grounds of appeal of revenue have no merit and thus same are dismissed.

Shri Mukundrao Govindrao Mankar

8. In the result, Revenue's appeal is dismissed.

Order pronounced in the open Court on 28.06.2017 Sd/- Sd/-

P.K. BANSAL
VICE PRESIDENT

AMARJIT SINGH
JUDICIAL MEMBER

NAGPUR, DATED: 28.06.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Nagpur City concerned;
- (5) The DR, ITAT, Nagpur;
- (6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Nagpur