

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.3.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case (Appeal) Nos.227 and 228 of 2019

Shri.V.Ramesh
PAN: ADJPR2424H

Appellant in TCA 227/2019

Shri.S.Ramu
PAN: AFVPR5642H

Appellant in TCA 228/2019

Vs.

The Assistant Commissioner of Income Tax
Corporate Circle-1(3),
Chennai 600 034.

Respondent

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, Chennai, dated 24.12.2018 made in ITA Nos.2836/Chny/2017 and 2837/Chny/2017.

For Appellants : Mr.G.Baskar
For Respondent : Mr.T.Ravikumar,
Senior Standing Counsel

COMMON JUDGMENT

(Delivered by DR.VINEET KOTHARI, J)

These Appeals have been filed by the Assessees raising the following substantial questions of law arising from the order passed by the Income Tax Appellate Tribunal dated 24.12.2018 for the Assessment Year 2006-2007:-

"i) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right

in law in not considering the ground that the Assessing Officer has no jurisdiction to re-open the assessment under Section 147 of the Income Tax Act, 1961?

ii) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not considering the fact that the Assessing Officer has no jurisdiction under Section 147 to re-open an assessment to make a protective re-assessment?"

2. The relevant portion of the order passed by the Tribunal is quoted below for ready reference:-

*"3. The brief facts of the case are that, both the assesseees are holding 50% equity shares in **M/s.Microprints Pvt. Ltd.** and **M/s.Tallboy Stationeries Pvt. Ltd.**, and are also Directors in both these Companies, filed their return of income and thereafter the assessment was re-opened under Section 147 of the Act and finally assessment order under Section 143(3) read with Section 147 of the Act was passed on 17.1.2014 wherein the learned Assessing Officer made **addition of Rs.53,69,803/-** in the hands of each of the assesseees invoking the*

provisions of Section 2(22)(e) of the Act because M/s.Chennai Micro Finance Pvt. Ltd., had extended an advance of Rs.53,69,803/- to M/s.Tallboy Stationeries Pvt. Ltd., and the accumulated reserves and surplus of M/s.Chennai Micro Finance Pvt. Ltd., was over and above the loan extended.

4. At the outset the learned Assessee's Representative submitted before us that when the total amount of loan extended by M/s.Chennai Micro Finance Ltd., to M/s.Tallboy Stationeries Pvt. Ltd., was Rs.53,69,803/- the entire amount cannot be added to the income of both the shareholders having 50% stakes in those companies by invoking the provisions of Section 2(22)(e) of the Act, which would amount to double taxation. **The learned AR pleaded** that since both the shareholders are having 50% stake in both the companies, the amount of Rs.53,69,803/- **may be proportionately added in the hands of both the assessees** viz., Rs.26,84,902/- in the case of Shri.V.Ramesh and Rs.26,84,901/- in the case of Shri.S.Ramu. The learned Department's Representative could not controvert to the submission of the learned AR.

5. We have heard the rival submissions and carefully perused the materials on record. We find merit in the contention of the learned AR. Adding the amount of Rs.53,69,803/- in the hands of each of the assesseees would amount to double taxation and that is not permissible. Moreover with respect to the transaction of extending loan by M/s.Chennai Micro Finance Ltd., to M/s.Tallboy Stationeries Pvt. Ltd., the provisions of Section 2(22)(e) of the Act attracts the amount of deemed dividend only to the extent of the loan amount which is further restricted to the extent of reserves and surplus of the Company advancing loan. Therefore, in the relevant cases before us the aggregate additions in the hands of the shareholders who are the assesseees cannot be made more than Rs.53,69,803/-. Hence, it would be an appropriate analogy that the entire amount which is liable to be treated as deemed dividend has to be apportioned between both the shareholders in whose cases the conditions stipulated for attracting the provisions of Section 2(22)(e) of the Act are satisfied. Therefore as pleaded by the learned AR, it would be judicious to make addition in the hands of Shri.V.Ramesh an

*amount of Rs.26,84,902/- and Shri.S.Ramu-
Rs.26,84,901/-. It is ordered accordingly."*

3. At the outset, the learned counsel for the Appellants/Assessees Mr.G.Baskar contended that no such concession was made before the learned Tribunal for apportioning the additions made by the Assessing Authority on protective basis in the hands of the Assessees viz., the two shareholders who are also Directors of M/s.Tallboy Stationeries Private Limited viz., Mr.V.Ramesh and Mr.V.Ramu, under section 2(22)(e) of the Act, to the extent of 50% of the total amount of loans and advances made by M/s.Chennai Micro Finance Ltd., to M/s.Tallboy Stationeries Private Limited for the present Assessment Year 2006-2007 in question. He further contended that by a written submission filed before the learned Tribunal on 9.4.2018, much before the present order passed on 24th December 2018, it was clearly submitted before the learned Tribunal that an identical issue came up for consideration before the Tribunal in the Assessees' own case for the Assessment Year 2011-12 wherein Tribunal had remitted the case to the Assessing Officer for fresh consideration by verifying as to whether the amount was finally moved to the Assessees or not. He further submitted that despite the said position, the learned Tribunal, recording the concession or pleading by the learned AR made on behalf of the Assessees converted the protective assessment made by the Assessing Authority into a substantive one and gave partial relief deciding the said addition under section 2(22)(e)

of the Act to the extent of 50% in the hands of both the shareholders of both the Companies.

4. The learned Senior Standing Counsel appearing for the Revenue, however, tried to justify the said order and submit that even though no Affidavit of the counsel was taken by the Tribunal, a notice may be issued to the Registrar of the Tribunal as it is not known whether in fact such concession was made before the Tribunal or not.

5. On merits, the learned counsel for the Assessee submitted that the loans and advances were made by one Company to another and not to the shareholders and since the money was not received even as loans and advances by the two shareholders in question, the same could not be taxed as deemed dividends in the hands of the present Assessee.

6. We have heard the learned counsels at some length.

7. We are constrained to observe that the learned Tribunal ought not to have recorded any such concession on the part of the learned AR on behalf of the Assessee in this manner contrary to the written submissions filed on 5.4.2018 before it, giving rise to a possibility of contending otherwise before the High Court. We had recently noticed this kind of improper recording of concession on the part of the learned Tribunal even in yet another case as well in **T.C.A.No.1019 of 2009 (M/s.Sri Kavitha Jewellers v. The Deputy Commissioner of Income Tax) dated 7.3.2019**. In that matter, the learned Members of the Tribunal had gone to the extent of directing the Authorised Representative on behalf of the

Assesseees to make a concession for some addition to be upheld in the undisclosed income. The Tribunal, under the Act, is a final fact finding Body and not a Court of Record. It is vested with a responsible job of returning the correct and proper finding of facts based on relevant evidence and material.

8. We expressed our pain and anxiety against such observation of the learned Tribunal. In the present case also despite the fact that it was brought to the knowledge of the Assessing Authority by way of written submission on 9.4.2018 that an identical issue came up for consideration before the Tribunal in the Assesseees' own case for the Assessment Year 2011-12 wherein Tribunal had remitted the case to the Assessing Officer for fresh consideration for verifying as to whether the amount has finally moved or reached to the individual Assesseees or not, the Tribunal has proceeded to record such a concession as having been made on behalf of the Assesseees.

9. We do not find any justification on the part of the learned Members of the Tribunal to record any such concession on behalf of the Assesseees and make additions invoking the provision under Section 2(22)(e) of the Act in the hands of the individual Assesseees viz., the shareholders of the two Companies. Unless the findings of facts are returned by the Assessing Authority on the basis of materials that the money was received by the person concerned, there was no question of taxing the same as 'deemed dividends' in the hands of the individual Assesseees, who are Directors/Shareholders with substantial interest. We, therefore, cannot

sustain this type of orders passed by the learned Members of the Tribunal and we are sorry to note this kind of concessions recorded unauthorisedly by the learned Members of the Tribunal.

10. Expressing again our anguish and pain on the same, we direct that in future, if any such concession is made by any Authorised Representative on behalf of the Assessee, the Tribunal should take either an Affidavit from Assessee and the counsel on behalf of the Assessee or atleast a written endorsement made on the record of the case duly signed by them, so that no such occasion of taking a stand otherwise or contra to the alleged concession made by them, would arise before the higher Courts.

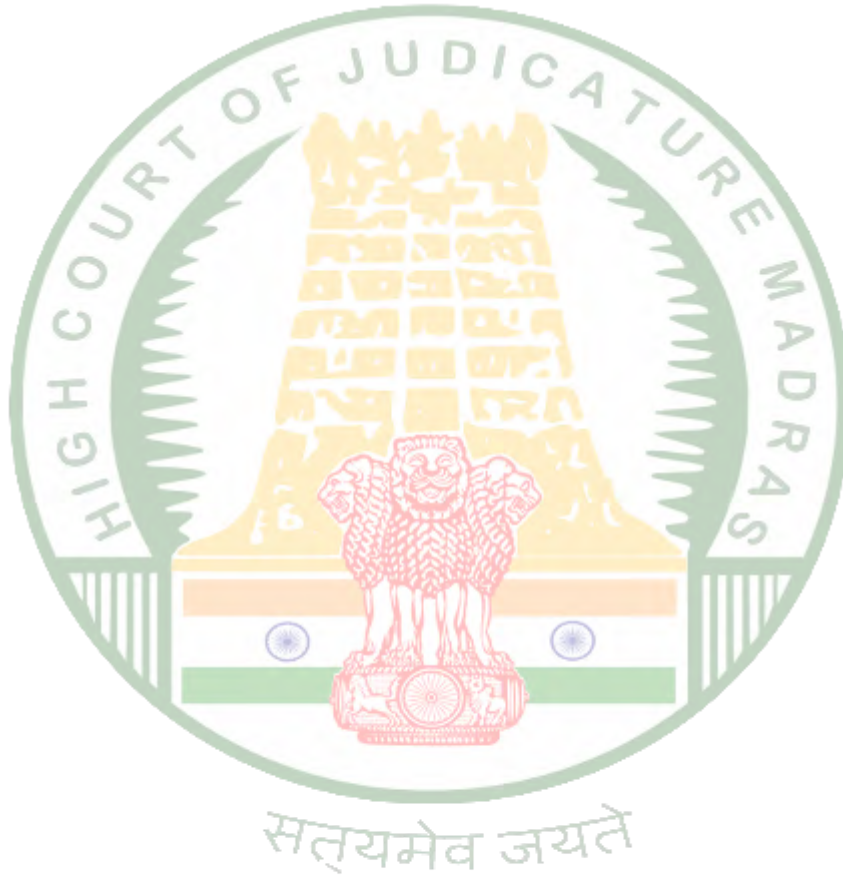
11. We allow these Appeals of the Assesseees and remit the matters to the Assessing Authority for the Assessment Year 2006-2007 for deciding the same as done in the Assessment Year 2011-2012 by order dated 23.11.2016 of the Tribunal and where the matter is said to be still pending. **A copy of this order be sent to the President of the Income Tax Appellate Tribunals** for circulation to all the Benches of Tribunal for wider circulation to all the concerned **and also a copy to the Law Secretary, Ministry of Law and Justice, Delhi** for bringing it to the notice of the newly appointed Members. No costs.

Index : Yes
Internet : Yes
ssk.

(V.K.,J.) (C.V.K.,J.)
11.3.2019

To

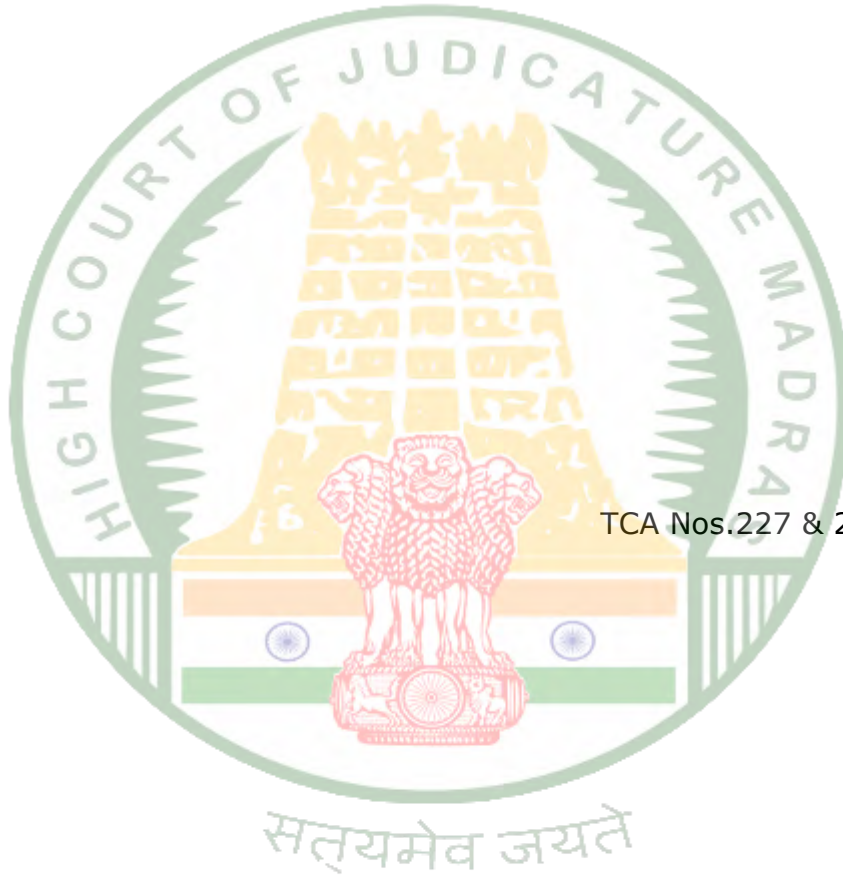
1. The Assistant Commissioner of Income Tax
Corporate Circle-1(3),
Chennai 600 034.
2. Income Tax Appellate Tribunal,
Madras 'C' Bench, Chennai



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DR.VINEET KOTHARI, J.
and
C.V.KARTHIKEYAN, J.

ssk.



TCA Nos.227 & 228 of 2019

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11.3.2019.

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'C' BENCH, CHENNAI
श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं ए. मोहन अलंकामणी, लेखा सदस्य के समक्ष
BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.2836/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2006-07)

Shri V. Ramesh, No.14, T.S.D. Nagar, 1 st Main Road, Arumbakkam, Chennai – 600 106.	Vs	The ACIT, Corporate Circle – 1(3), Chennai – 34.
PAN: ADJPR2424H		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

&

आयकर अपील सं./I.T.A.No.2837/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2006-07)

Shri S. Ramu, Flat No.2, Door No.10, Sabari Apartments, Parthasarathy St, Ayyavoo Colony, Aminjikarai, Chennai – 600 029.	Vs	The ACIT, Corporate Circle – 1(3), Chennai – 600 034.
PAN:AFVPR5642H		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellants by	:	Shri G. Baskar, Advocate
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Clement Ramesh Kumar, Addl. CIT

सुनवाई की तारीख/Date of hearing	:	14.11.2018
घोषणा की तारीख /Date of Pronouncement	:	24.12.2018

आदेश / ORDER

Per A. Mohan Alankamony, AM:-

These appeals by the assesseees are directed against the orders passed by the Ld. Commissioner of Income Tax (Appeals)-1, Chennai, both dated 27.09.2017 in respect of Shri V. Ramesh and Shri S. Ramu in ITA

No.05/CIT(A)-1/2017-18 & ITA No.04/CIT(A)-1/2017-18 respectively for the assessment year 2006-07 passed U/s. 250(6) r.w.s. 143(3) & 147 of the Act. Since in both the assessee's case the issue is interrelated and identical, they are heard together and disposed off by this common order.

2. The assessees have raised several grounds in their appeal however the lone issue argued before us is that the Ld.AO as well as the Ld.CIT(A) has erred in making addition of Rs.53,69,803/-, in the hands of each of the assessees U/s.2(22)(e) of the Act individually, when the total extent of loan advanced by M/s. Chennai Micro Prints Pvt. Ltd., to M/s. Tallboy Stationery Pvt. Ltd. was only Rs.53,69,803/-, wherein both the assessees hold 50% of equity shares of both the companies.

3. The brief facts of the case are that, both the assessees are holding 50% equity shares in M/s. Microprints Pvt. Ltd., and M/s. Tallboy Stationeries Pvt. Ltd., and are also Directors in both these Companies, filed their return of income and thereafter the assessment was reopened U/s.147 of the Act and finally assessment order U/s.143(3) r.w.s. 147 of the Act was passed on 17.01.2014 wherein the Ld.AO made addition of Rs.53,69,803/- in the hands of each of the assessees invoking the provisions of Section 2(22)(e) of the Act because M/s. Chennai Micro Finance Pvt. Ltd., had extended an advance of Rs.53,69,803/- to M/s. Tallboy Stationaries Pvt. Ltd., and the accumulated reserves & surplus of M/s. Chennai Micro Finance Pvt. Ltd., was over and above the loan extended.

4. At the outset the Ld.AR submitted before us that when the total amount of loan extended by M/s. Chennai Micro Finance Ltd., to M/s. Tallboy Stationaries Pvt. Ltd., was Rs.53,69,803/- the entire amount cannot be added to the income of both the shareholders having 50% stakes in those companies by invoking the provisions of Section 2(22)(e) of the Act, which would amount to double taxation. The Ld.AR pleaded that, since both the shareholders are having 50% stake in both the companies, the amount of Rs.53,69,803/- may be proportionately added in the hands of both the assesseees viz., Rs.26,84,902/- in the case of Shri V. Ramesh and Rs.26,84,901/- in the case of Shri S. Ramu. The Ld.DR could not controvert to the submission of the Ld.AR.

5. We have heard the rival submissions and carefully perused the materials on record. We find merit in the contention of the Ld.AR. Adding the amount of Rs.53,69,803/- in the hands of each of the assesseees would amount to double taxation and that is not permissible. Moreover with respect to the transaction of extending loan by M/s. Chennai Micro Finance Ltd., to M/s. Tallboy Stationaries Pvt. Ltd., the provisions of Section 2(22)(e) of the Act attracts the amount of deemed dividend only to the extent of the loan amount which is further restricted to the extended of reserves and surplus of the Company advancing loan. Therefore in the relevant cases before us the aggregate additions in the hands of the shareholders who are the assesseees cannot be made more than Rs.53,69,803/-. Hence it would be an appropriate analogy that the entire amount which is liable to be treated as deemed dividend has to be apportioned between both the shareholders in whose cases the conditions stipulated for attracting the provisions of Section 2(22)(e) of the Act are satisfied. Therefore as pleaded by the Ld.AR, it would be judicious to

make addition in the hands of Shri V. Ramesh an amount of Rs.26,84,902/- and Shri S. Ramu - Rs.26,84,901/-. It is ordered accordingly.

6. In the result the appeals of both the assesseees are partly allowed as indicated herein above.

Order pronounced on 24th December, 2018 at Chennai.

Sd/-

(एन.आर.एस. गणेशन)
(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

Sd/-

(ए. मोहन अलंकामणी)
(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated 24th December, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- | | | |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |